Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1888

EDWARD W. MAHER, COMMISSIONER OF
INCOME MAINTENANCE,
STATE OF CONNECTICUT,
Petitioner,

v.

VIRGINIA GAGNE, INDIVIDUALLY AND
ON BEHALF OF OTHERS SIMILARLY SITUATED,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Edward W. Maher, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 9, 1979.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported. A copy of the slip opinion appears in the Appendix hereto. The opinion of the District Court for the District of Connecticut is reported at 455 F. Supp. 1344.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 9, 1979, and the petitioner was granted an extension of time to June 22, 1979 in which to file this petition. This petition for certiorari was filed within the required time as extended. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, in an action combining a constitutional claim under 42 U.S.C. §1983 with a statutory claim under the Social Security Act, which is subsequently settled by entry of a consent decree, and the merits of the §1983 claim are never determined, an award of attorney's fees against the Connecticut Commissioner of Income Maintenance, in his official capacity, to be paid out of State funds, is authorized by the Civil Rights Attorney's Fees Awards Act of 1976.

2. Whether, as the Court of Appeals has alternatively ruled, the award of the attorney's fees against the State of Connecticut in this action was permissible as an "ancillary effect" under *Edelman v. Jordan,* 415 U.S. 651 (1974), and therefore not barred by the Eleventh Amendment.

STATUTES INVOLVED

United States Code, Title 42:

§602

(a) A State plan for aid and services to needy families

with children must . . . (7) except as may otherwise be provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;

§1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§1988

In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

STATEMENT OF THE CASE

The plaintiff, a working recipient of public assistance under Connecticut's program of aid to Families with Dependent Children (AFDC), brought an action in the United States

District Court against the Commissioner of Social Services (now called Commissioner of Income Maintenance) in which she alleged that the petitioner's policies and practices governing the exemption from income of work-related expenses were in conflict with §402(a)(7) of the Social Security Act, 42 U.S.C. §602(a)(7). She also claimed that the Department's practices and policies violated the due process and equal protection clauses of the Fourteenth Amendment, and that this action was authorized under 42 U.S.C. §1983.

The plaintiff's constitutional claims were listed by the district court as:

> "whether an impermissible distinction had been created between those working welfare recipients whose work-related expenses were fully considered in the computation of AFDC awards and those whose work-related expenses were not fully considered, in violation of the equal protection clause; whether the defendant, by creating a table of standard allowances, which could not be challenged in individual cases, set up an irrebuttable presumption with respect to work-related expenses, in violation of the due process clause; and whether the failure to provide written notice of the opportunity for an evidentiary hearing, if the welfare recipient disputed the defendant's calculation of work-related expenses, violated the due process clause." Appendix, p. 9a.

While the case was pending, the Commissioner amended his regulations to provide expressly for deduction of all reasonable work-related expenses. Thereafter, plaintiff amended her complaint alleging that the new policy as implemented still resulted in routine disallowance of expenses in excess of the standard allowances, and that the State had not adopted reasonable procedures to notify AFDC recipients of their right to work-related expenses. Appendix, p. 3a.

The parties subsequently negotiated a settlement of the case, and a consent judgment, which provided, *inter alia,* that the action would be certified as a class action, was entered by the district court. Appendix, p. 21a.

Thereafter, the plaintiff's attorneys moved for an award of attorney's fees against the petitioner, in his official capacity as Commissioner of Social Services, pursuant to the Civil Rights Attorney's Fees Award Act of 1976 (Fees Act). The district court subsequently awarded plaintiff's attorneys a fee of $3,012.19 to be paid out of State funds (*Appendix,* p. 2a) and, on appeal, the Court of Appeals affirmed the district court's award.

The petitioner argued before the Court of appeals, *inter alia,* that the Fees Act is not applicable to a case such as this one since none of the plaintiff's "civil rights" (as that term is commonly understood) had been violated, R- , *Brief of Appellant*. pp. 16, 29; that under the language of the Fees Act an award of attorney's fees is authorized only if the plaintiff is "the prevailing party" on her *constitutional* claim, because the Fees Act does not authorize fees for successful claims under the Social Security Act, *Appendix,* p. 5a; and that Congress did not intend to authorize an award of fees in a case where a plaintiff combines a constitutional claim with a statutory claim and the case is thereafter settled without a judicial determination on the merits of the constitutional claim. *Id.*

The petitioner also argued that the plaintiff could not be considered "the prevailing party" under the Fees Act since she was unsuccessful in an administrative fair hearing she had requested to contest the State's disallowance of the same work-related expenses she was contesting in this action. *Appendix,* p. 13a n. 7.

The petitioner further argued that, in any event, the Eleventh Amendment was a bar to the award of fees against the State because the power of Congress to abrogate a State's sovereign immunity when acting pursuant to §5 of the Fourteenth Amendment extends only to suits in which a party prevails on a constitutional claim. *Appendix*, p. 12a.

The Court of appeals rejected these arguments and affirmed the district court's award of attorney's fees; and remanded on the plaintiff-appellee's cross-appeal.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW APPEARS TO CONFLICT WITH THIS COURT'S DECISION IN *EDELMAN V. JORDAN*.

In *Edelman v. Jordan*, 415 U.S.651 (1974) this court held that retroactive welfare benefits awarded to plaintiffs by a federal district court by reason of a wrongful denial of benefits by Illinois officials prior to the entry of the court's order determining the wrongfulness of their actions, violated the Eleventh Amendment. The Court stated, therein, *inter alia*, that "[T]hough a §1983 action may be instituted by public aid recipients . . . a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury . . . " 415 U.S., at 676-677.

The Court of appeals has held in this case that, "although the Eleventh Amendment generally bars federal court awards of compensatory relief to be paid from a State treasury . . . there are at least two exceptions . . . relevant here," to wit:

> 1) that the award of attorneys' fees in this case was a permitted "ancillary effect" of a proper prospective decree and therefore not barred by the Eleventh Amendment, Appendix, p. 11a; and
>
> 2) ". . . that it is within Congress' Fourteenth Amendment power to authorize a fee award when a party prevails [under the Fees Act] as long as the pendent constitutional claim is a substantial one and arises out of the same operative facts." *Appendix*, p. 12a.

Petitioner submits that neither the above "exceptions" supports the award of fees against the State in this action. First, because the award of attorney's fees against the State made by the district court does not fit within this Court's careful definition in *Edelman* of an "ancillary effect" since the award of fees in this case is not "the necessary result of compliance with decrees which by their terms were prospective in nature," 415 U.S. 668; and, secondly, if a party "prevails", under the Fees Act, on a *statutory* claim (in this case the Social Security Act) the Fees Act does *not* abrogate a State's Eleventh Amendment immunity because, in such a case, Congress is not acting (at least in this case) under §5 to enforce a provision of the Fourteenth Amendment.

Hutto V. Finney distinguished.

Subsequent to *Edelman*, this Court held in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) that Congress has the power, when acting pursuant to §5 of the Fourteenth Amendment, to enact legislation authorizing federal courts to award attorney's fees against a State as a means of enforcing that Amendment's substantive guarantees. In so doing, however, the Court distinguished that case from *Edelman v. Jordan*, *supra*, when it stated that "[O]ur analysis [in Fitzpatrick] begins where *Edelman* ended, for in this Title VII case the 'threshold fact of congressional authorization,' 415 U.S., at 672, to sue the State as employer is clearly present." 427 U.S., at 452.

More recently, in *Hutto v. Finney*, 437 U.S. 678 (1978), an award of attorney's fees to be paid from funds of the State of Arkansas awarded by the Court of Appeals pursuant to the Fees Act, *supra*, was upheld by this Court. However, in *Hutto*, it was found that conditions in the Arkansas prison system constituted cruel and unusual punishment in violation of the Eight and Fourteenth Amendments. The instant case is distinguishable from *Hutto* in that there was no finding of a deprivation of any of plaintiff's constitutional rights.

Moreover, this Court itself, in *Hutto,* distinguished that case from *Edelman v. Jordan, supra,* when it stated, *inter alia:*

> ". . . [F]inally, the claims asserted in *Employees* and in *Edelman v. Jordan* . . . were based on a statute rooted in Congress Art. I power . . . *Edelman v. Jordan, supra,* at 674 (underlying claim based on Social Security Act provisions dealing with aid to aged, blind, and disabled, 42 U.S.C. §§1381-1385). In this case, as in *Fitzpatrick v. Bitzer,* 427 U.S. 445, the claim is based upon a statute enacted to enforce the Fourteenth Amendment . . . ."
>
> 437 U.S., at 698 n. 31.

Edelman v. Jordan should be controlling in this case.

The factual situation in the present case is very similar to *Edelman* (except that it is an award of attorney's fees rather than retroactive welfare benefits which is at issue) in that it is an action brought by a recipient of public welfare benefits under 42 U.S.C. §1983 in which a constitutional claim has been combined with an underlying statutory claim based upon the Social Security Act. In *Edelman* the underlying claim dealt with aid to aged, blind, and disabled, 42 U.S.C. §§1381-1385, whereas in this action the claim deals with aid to families with dependent children (AFDC) 42 U.S.C. §601, *et seq.* It is submitted, therefore, that this case should be controlled by this Court's decision in *Edelman* and not by the decision in *Hutto v. Finney, supra,* since, in this case, as in *Edelman,* the plaintiff was not seeking to enforce any of her "civil rights" under the Fourteenth Amendment — she was merely challenging the disallowance of certain work-related expenses under the AFDC program.

The plaintiff's "civil rights" were not in issue in this case – the Fees Act is not applicable.

In *Edelman v. Jordan, supra,* merely because the action was brought under §1983 and an equal protection claim was combined with the underlying statutory claim, there is no indication therein that the Court viewed the action as one involving the enforcement of "civil rights."

Just recently in *Chapman v. Houston Welfare Rights Organization,* 47 U.S.L.W. 4528, (May 15, 1979), this Court, in discussing jurisdictional questions presented by that case, shed further light upon "civil rights" actions brought under §1983 when it stated, *inter alia:*

> ". . . [S]ection 1983, when properly invoked, satisfied the first requirement [that under 28 U.S.C. §1343(3) a civil action must be authorized by law]: it ensures that the suit will not be dismissed because not 'authorized by law: But it cannot satisfy the second, since by its terms, as well as its history, it does not provide any rights at all.
>
> "We reach a similar conclusion with respect to the argument that §1983 is a statute 'providing for the protection of civil rights, including the right to vote: Standing alone, §1983 clearly provides no protection for civil rights since, as we have just concluded, §1983 does not provide any substantive rights at all. To be sure, it may be argued that §1983, does in some sense 'provid[e] for the protection of civil rights' when it authorizes a cause of action based on the deprivation of civil rights guaranteed by other Acts of Congress. But in such cases, there is no question as to jurisdiction, and no need to invoke §1983 to meet the 'civil rights' requirement of §1343(4); the Act of Congress which is the actual substantive basis of the suit clearly suffices to meet the requisite test. It

> is only when the underlying statute is *not* a civil rights act that §1983 need be invoked by those in claimants' position to support jurisdiction. *And in such cases, by hypothesis, §1983 does not provid[e] for the protection of civil rights.*"

47 U.S.L.W., at 4533 (emphasis added, footnote omitted).

The Court went on to state, *inter alia:*

> "[T]he Social Security Act does not deal with the concept of 'equality' or with the guarantee of 'civil rights,' as those terms are commonly understood . . . .
>
> ". . . the courts of appeals have consistently held that the Social Security Act is not a statute providing for 'civil rights' . . . . [W]e endorse those holdings, and find that a similar conclusion is warranted with respect to §1343(4) as well . . ." *Chapman v. Houston Welfare Rights Org., supra,* 47 U.S.L.W. at 4534.

It is true, of course, that unlike the plaintiffs in *Chapman, supra,* the plaintiff in this action *did* recite in her complaint, separate constitutional claims. (Set forth *supra,* at p. 4). But these "constitutional" claims are themselves based upon the provisions of the Social Security Act, and, were it not for the existence of §602(a)(7) of the Act, the recital of these "constitutional" claims would be meaningless.

Constitutional claims are customarily made to avoid jurisdictional problems.

It has become customary for a plaintiff in a case where the underlying claim is based on the Social Security Act, to set forth in the complaint at least one "equal protection" claim and/or one "due process" claim, and to recite that the action is brought under 42 U.S.C. §1983. The complaint then proceeds to set forth the underlying Social Security Act "statutory" claim. Under the liberal "substantiality" test of *Hagans v. Lavine,* 415 U.S. 528, (1974), there is then little chance that the complaint will be susceptible to a motion to dismiss for a lack of federal court jurisdiction.

In *Chapman, supra,* Mr. Justice Stewart recently took note of this practice in a dissenting opinion when he observed:

> "[F]inally, even a welfare recipient with a federal statutory claim may sue in federal court if his lawyer can link this claim to a substantial constitutional contention. And under the standard of substantially established by *Hagans v. Lavine,* 415 U.S. 528, such a constitutional claim would not be hard to construct."
>
> 47 U.S.L.W., at 4548.

In *Edelman, supra,* this Court stated, *inter alia,:*

> "[I]t is of course true that *Rosado v. Wyman,* 397 U.S. 397 (1970), held that suits in federal court under §1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States. But it has not heretofore been suggested that §1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself . . . ."
>
> 415 U.S., at 676-677.

And, of course, this Court has held in *Maher v. Roe,* 432 U.S. 464 (1977), that there is no constitutional right to receive public welfare benefits.

The legislative history: the House Report v. the Senate Report.

The Court of Appeals pointed out that the House Report of the legislative history of the Fees Act "directly addressed the situation [present in this action where a] . . . plaintiff joins a constitutional claim with a non-fee statutory claim" and provided therein that, in cases where the non-constitutional claim is dispositive, ". . . attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' " *Appendix*, p. 7a.

The *Senate* Report, however, contains no such language, and, it is to be noted, it was the *Senate* Bill which was passed *in lieu of* the House Bill. *1977 U.S. Code Cong. & Adm. News*, p. 6338. Moreover, there is no indication in the *Senate* Report that Congress intended to treat welfare benefits cases brought under the Social Security Act as "civil rights" cases. The types of cases specifically mentioned in the Senate Report include cases involving racial discrimination, voting rights, public accommodation, housing discrimination, and discrimination in a private restaurant. There is no mention of cases brought to enforce claims to public welfare benefits under the Social Security Act.

But even if the Court of Appeals was correct in finding that Congress did intend, in the Fees Act, to award fees to the "prevailing party" in a case of this kind, wherein the underlying claim was based on the Social Security Act, the Fees Act would be ineffectual to abrogate the State's Eleventh Amendment immunity because, in such a case, Congress is not acting to enforce a provision of the Fourteenth Amendment. To the extent that Congress may have had such an intention, it was not a proper exercise of congressional authority under §5 of the Fourteenth Amendment.

If the petitioner's foregoing analysis is correct, and if this case is controlled by the decision in *Edelman v. Jordan, supra*, the District Court's award of attorney's fees to be paid out of funds of the State of Connecticut, is barred by the Eleventh Amendment. Certiorari should be granted to resolve this important constitutional question.

2. THE PORTION OF THE DECISION BELOW WHICH HOLDS THAT THE AWARD OF ATTORNEY'S FEES AGAINST THE STATE WAS A PERMISSIBLE "ANCILLARY EFFECT" OF A DECREE LIMITED TO PROSPECTIVE INJUNCTIVE RELIEF IS A MISINTERPRETATION OF THIS COURT'S OPINION IN *EDELMAN V. JORDAN*.

In *Edelman*, this Court explained that a court order limited to prospective injunctive relief may nevertheless require state officials to expend money from the state treasury in complying with such a decree; "[b]ut the fiscal consequences to state treasuries in these cases were *the necessary result of compliance with decrees which by their terms were prospective in nature* . . . . [s]uch an *ancillary effect* on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra*." 415 U.S., at 667-668 (emphasis added).

It is submitted that the award of attorney's fees entered by the district court in the present action does *not* come within this Court's careful definition, *supra*, of an "ancillary effect." The Second Circuit has extended this Court's "ancillary effect" doctrine to include a situation "when the award is incident to a judgment granting prospective relief." Appendix, p. 10a.

The Court of Appeals has noted in its opinion, Id., at n.4, that the circuits are divided on this issue with the First and Fourth in agreement with the Second; the Third and Sixth Circuits *contra*.

This conflict also justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 503, 701—August Term, 1978.
(Argued January 19, 1979 Decided March 9, 1979.)
Docket Nos. 78-7414, 78-7432

VIRGINIA GAGNE, individually,
and on behalf of all others similarly situated,
Plaintiff-Appellee-Cross-Appellant,

—against—

EDWARD W. MAHER, Commissioner of Social Services,
Defendant-Appellant.

Before:

WATERMAN, FEINBERG and VAN GRAAFEILAND,
Circuit Judges.

Appeal and cross-appeal from order of the United States District Court for the District of Connecticut, Chief Judge T. Emmet Clarie, awarding attorney's fees under Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

Affirmed in part, remanded in part.

Edmund C. Walsh, Assistant Attorney General, Hartford, Connecticut (Carl R. Ajello, Attorney General, Paul M. Shapiro, Assistant Attorney General, Hartford, Connecticut, of Counsel), *for Defendant-Appellant.*

David C. Shaw, Hartford, Connecticut (Legal Aid Society of Hartford County, Inc., Joan Pilver, Hartford, Connecticut, of Counsel), *for Plaintiff-Appellee-Cross-Appellant.*

◆

Feinberg, *Circuit Judge:*

This case raises interesting questions regarding application of the Civil Rights Attorney's Fees Awards Act of 1976 (Fees Act), which amended 42 U.S.C. § 1988. Defendant Edward W. Maher, Commissioner of Social Services of the State of Connecticut, appeals from an order of the United States District Court for the District of Connecticut, 455 F. Supp. 1344 (1978), Chief Judge T. Emmet Clarie, awarding attorneys' fees of $3,012.19 to the Legal Aid Society of Hartford County, Inc., the attorneys for plaintiff Virginia Gagne, to be paid by appellant Commissioner in his official capacity out of State funds.[1] The state asserts that the award of attorneys' fees in the circumstances of this case is not authorized by the Fees Act and, in any event, is barred by the Eleventh Amendment. Plaintiff cross-appeals, arguing that the award was too low. For reasons given below, we affirm the judgment of the district court on the State's appeal, and remand for further consideration on plaintiff's appeal.

I

Virginia Gagne, a working recipient of Aid to Families with Dependent Children (AFDC), commenced the underlying action that gave rise to the fee award in January 1975. On behalf of herself and others similarly situated, plaintiff alleged that Connecticut's policies and procedures for determining work-related expenses used in computing AFDC benefits violated the United States Constitution and the Social Security Act.

In the original complaint, plaintiff sought a declaratory judgment that Connecticut's regulations regarding maximum work-related transportation and lunch allowances contravened federal statutes and the United States Constitution, an injunction requiring defendant to take into account all reasonable work-related expenses in computing AFDC benefits and an order requiring defendant to notify affected class members of their right to reapply for benefits. In May 1975, while discovery was taking place in the action, defendant amended its regulations to provide expressly for deduction of all reasonable work-related expenses. In September 1976, plaintiff filed an amended complaint, alleging that the new policy as implemented still resulted in routine disallowance of expenses in excess of the standard allowances and that the State had not adopted reasonable procedures to notify AFDC recipients of their right to deduct work-related expenses. The parties negotiated a settlement in early 1977, and the district court entered a consent decree in March 1977. In this settlement defendant agreed to allow AFDC recipients to prove that they incurred work-related expenses in excess of standard allowances, to double the standard allowance for transportation expenses, to recompute the standard allowances annually using cost of living data and to notify all working recipients of their rights with respect to the work-related expense deduction.

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[1] For this reason and for convenience, we frequently refer hereafter to appellant as the State.

The district judge viewed the consent decree as a victory for plaintiff and held, over the objections of the State, that she was entitled to a fee award under the Fees Act. Finding that such an award against the State would not violate the Eleventh Amendment, the judge granted plaintiff's attorneys' fees of $3,012.19.

II

Before us, the State continues to oppose the fee to plaintiff's lawyers. We turn first to the question whether Congress intended to authorize an award of attorneys' fees in this situation. In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), the Supreme Court held that only Congress can authorize an exception to the usual American rule that attorneys' fees are usually not recoverable by the winning party in litigation in federal courts. Congress thereafter amended 42 U.S.C. § 1988 in the Fees Act, Pub. L. No. 94-559, 90 Stat. 2641 (1976), to permit a federal court to award attorneys' fees to a prevailing party in suits brought to enforce certain civil rights acts, among them 42 U.S.C. § 1983. The Fees Act provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow *the prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs. (Emphasis supplied.)

We explained the purpose of this Act in *Mid-Hudson Legal Services, Inc. v. G & U, Inc.*, 578 F.2d 34, 36 & n.2 (2d Cir. 1978):

> In order to encourage compliance with certain civil rights laws Congress has often authorized recovery of attorneys' fees by plaintiffs who, through their private suits under such statutes, act as private attorneys general by enforcing federal policy. E.g., Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612(c); the Equal Employment Amendments of 1972, 42 U.S.C § 2000e-16(b). In accordance with this approach, prior to *Alyeska* many federal courts had exercised their traditional equity powers to award attorneys' fees under the Reconstruction Civil Rights Acts.... The aim of § 1988, therefore, was to regain consistency in the application of fee shifting under the civil rights acts.

See also S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), reprinted in [1976] U.S. Code, Cong. & Ad. News 5908 (Senate Report).

The State contends that under the language of the Act quoted above, plaintiff is entitled to attorneys' fees only if she was the prevailing party on her constitutional claims, since the Fees Act does not authorize fees for successful claims under the Social Security Act. Appellant argues that Congress did not intend to authorize fee awards when plaintiff joins a constitutional claim with such a statutory claim and then the entire case is settled without a judicial determination that plaintiff had a meritorious constitutional claim. The State further argues that plaintiff cannot be viewed as the prevailing party on any claim because she received very little of the relief requested, most of the terms of the consent decree did not change existing practices and any changes that were brought about by the consent decree would have been adopted by the State on its own initiative anyway.

Although the Fees Act and its legislative history do not specifically state that attorneys' fees are authorized in this precise situation, the statements of Congressional intent lead us to that conclusion. The Senate Report indicates that attorneys' fees should be awarded in a wide variety of situations, including consent judgments, and cites, among other authorities, *Kopet v. Esquire Realty Co.*, 523 F.2d 1005 (2d Cir. 1975).[2] In that case, 523 F.2d at 1008, and in *Blau v. Rayette-Faberge, Inc.*, 389 F.2d 469 (2d Cir. 1968), we indicated in analogous situations that counsel fees could be awarded whenever plaintiff's efforts confer benefits on the class, including those obtained through settlement. In addition, the House Report on the Fees Act directly addressed the situation in which plaintiff joins a constitutional claim with a non-fee statutory claim:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in [the Fees Act] with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees.... In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive.... In such cases, if the claim for which fees may be awarded meets the "substantiality" test, *see Hagans v. Lavine*, [415 U.S. 528 (1974)]; *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact."

H.R. Rep. No. 1558, 94th Cong., 2d Sess. at 4 n.7 (1976) (Citations omitted). See also *Kimbrough v. Arkansas Activities Association*, 574 F.2d 423 (8th Cir. 1978).

Given the legislative intent to authorize award of attorneys' fees to the prevailing party in settled cases and to avoid unnecessary decision of constitutional issues, we think it clear that Congress intended the test set forth in the House Report to govern the award of attorneys' fees in suits that are settled as well as in those that proceed to a judgment on a "non-fee" claim. The State's interpretation of legislative intent would encourage plaintiffs to try cases in which reasonable settlement offers have been received, merely to ensure a fee award. Cf. *Parker v. Matthews,* 411 F. Supp. 1059, 1062 (D. D.C. 1976), aff'd sub nom. *Parker v. Califano,* 561 F.2d 320 (D.C. Cir. 1977). In view of the legislative history, we cannot attribute such an intent to Congress. Thus we conclude, that once it has been determined that plaintiff obtained benefits for the class in the settlement on some claim, plaintiff is "the prevailing party" within the meaning of the statute. It does not matter which claim induced the concessions or which claim would have been successful at trial, as long as the constitutional claim is substantial and arises from the same operative facts as the non-fee claim.

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[2] The Senate Report at 5, [1976] U.S. Code, Cong. & Ad. News at 5912-13 states:

> Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. *Kopet v. Esquire Realty Co.*, 523 F.2d 1005 (2d Cir. 1975), and cases cited therein; *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969); *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (3d Cir. 1970); *Aspira of New York, Inc. v. Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975).

Applying these standards here, we find that the prerequisites for an award of attorneys' fees have been met. Although the State argues that plaintiff did not prevail on any grounds, the district court found otherwise:

> The consent decree gave the plaintiff, as well as the class she represented, virtually all the relief sought in the complaint. Under the terms of the consent decree the defendant agreed to: permit working AFDC recipients to prove that they incur work-related expenses which are in excess of the standard allowance established by the defendant; conduct an annual review for the purpose of updating the standard allowances; publish heretofore unpublished standard allowances; double the standard transportation allowance from $.06 to $.12 per mile; provide written notice to working AFDC recipients of the precise amount of work-related expenses which are to be allowed as to each recipient; provide written notice of the AFDC recipients' right to an evidentiary hearing in the event that the recipient disagrees with the defendant's calculation of work-related expenses; and stay any reduction in AFDC benefits if the recipient requests an evidentiary hearing within ten days of receiving the aforesaid written notice.

455 F. Supp. at 1346. These findings are amply justified by the record, which also demonstrates that the State

changed its policies with great reluctance and only under the pressure of the lawsuit. Whether the court could have ordered the State to accept all the changes this lawsuit prompted it to make is irrelevant. The consent decree was the product of the litigation and plaintiff is entitled to use it to justify an award.

The district court, after noting that federal constitutional claims are "substantial" if they are sufficient to confer jurisdiction under the test of *Hagans v. Lavine,* 415 U.S. 528 (1974), found that plaintiff had raised several substantial constitutional claims that were properly pendent to the statutory claims. 455 F. Supp. at 1348. The court listed these constitutional claims as:

> whether an impermissible distinction had been created between those working welfare recipients whose work-related expenses were fully considered in the computation of AFDC awards and those whose work-related expenses were not fully considered, in violation of the equal protection clause; whether the defendant, by creating a table of standard allowances, which could not be challenged in individual cases, set up an irrebuttable presumption with respect to work-related expenses, in violation of the due process clause; and whether the failure to provide written notice of the opportunity for an evidentiary hearing, if the welfare recipient disputed the defendant's calculation of work-related expenses, violated the due process clause.

Id. We hold that the district court correctly found that plaintiff's constitutional claims were "substantial" under the relevant standard. Thus we conclude that on these facts Congress intended to authorize an award of fees to plaintiff's attorneys.

III

Appellant also argues that Congress did not have the power to authorize a fee award against a State in these circumstances. Although the Eleventh Amendment generally bars federal court awards of compensatory relief to be paid from a State treasury, see, e.g., *Edelman v. Jordan,* 415 U.S. 651 (1974), there are at least two exceptions to the Eleventh Amendment's general prohibition relevant here.[3] First, in interpreting the Eleventh Amendment, the Supreme Court has held that only retroactive monetary relief is prohibited, and that prospective relief against a State does not violate the Amendment even though it has a significant "ancillary effect on the state treasury." *Edelman v. Jordan,* supra, 415 U.S. at 667-68. This court has held that an award of attorneys' fees fits within the "ancillary effect" doctrine when the award is incident to a judgment granting prospective relief. *Fitzpatrick v. Bitzer,* 519 F.2d 559, 571-72 (2d Cir. 1975), affirmed in part, reversed in part, 427 U.S. 445 (1976); *Class v. Norton,* 505 F.2d 123, 126 (2d Cir. 1974); *Jordan v. Fusari,* 496 F.2d 646, 651 (2d Cir. 1974).[4] In addition, the Supreme Court in a pre-*Edelman* summary decision, affirmed a three-judge court award of attorneys' fees against a state. *Sims v. Amos,* 340 F. Supp. 691 (M.D. Ala.), aff'd, 409 U.S. 942 (1972). In this circuit, summary holdings of the Supreme Court are binding precedent, *Doe v. Hodgson,* 500 F.2d 1206, 1207-08 (2d Cir. 1974), and we do not interpret subsequent Supreme Court decisions as overruling *Sims v. Amos.*[5] Thus, we adhere to our own precedents, which we believe are consistent with Supreme Court authority, and hold that the award of attorneys' fees in this case was a permitted "ancillary effect" of a proper prospective decree and therefore not barred by the Eleventh Amendment.

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[3] See generally, Note, Attorneys' Fees and the Eleventh Amendment, 88 Harv. L. Rev. 1875, 1888-1902 (1975).

[4] The circuits are divided on this issue with the First and Fourth Circuits in agreement with this Circuit. Compare *Souza v. Travisono,* 512 F.2d 1137, 1139-40 (1st Cir.), vacated and remanded, 423 U.S. 809 (1975) (for disposition after remand, see *Souza v. Southworth,* 564 F.2d 609 (1st Cir. 1977)); *Boston Chapter, NAACP, Inc. v. Beecher,* 504 F.2d 1017, 1028-30 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975) and *Thonen v. Jenkins,* 517 F.2d 3, 7-8 (4th Cir. 1975) with *Skehan v. Board of Trustees,* 501 F.2d 31, 42 & n.7 (3d Cir. 1974), vacated and remanded, 421 U.S. 983 (1975), remanded, 538 F.2d 53 (1976) (en banc), cert. denied, 429 U.S. 979 (1976) and *Jordan v. Gilligan,* 500 F.2d 701, 705-10 (6th Cir. 1974), cert. denied, 421 U.S. 991 (1975). See also *Samuel v. University of Pittsburgh,* 538 F.2d 991, 999 (3d Cir. 1976); *Brandenburger v. Thompson,* 494 F.2d 885, 888 (9th Cir. 1974).

[5] Although some courts have ruled that the affirmance in *Sims v. Amos* was implicitly overruled by *Edelman v. Jordan,* see *Jordan v. Gilligan, supra* note 4, 500 F.2d at 706-08; *Skehan v. Board of Trustees, supra* note 4, 501 F.2d at 42 & n.7; but see *Bond v. Stanton,* 528 F.2d 688, 691-92 (7th Cir. 1976), remanded, 429 U.S. 973 (1977), fee award reinstated on basis of Fees Act, 555 F.2d 172 (7th Cir. 1977), cert. denied, 46 U.S.L.W. 3803 (July 3, 1978), we think that recent Supreme Court actions indicate at most that the Court still considers the question an open one. In *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 269 n.44 (1975), the Court stated that "an award [of attorneys' fees] against a state government would raise a question with respect to its permissibility under the Eleventh Amendment, a question on which the lower courts are divided," but the Court expressly declined to comment on the issue. The Court included in its list of conflicting lower court decisions the three-judge court ruling in *Sims v. Amos, supra.* In *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), affirming this court's award of attorneys' fees, 519 F.2d at 571-72, the Court said it did not have to reach the issue whether we had correctly applied the "ancillary effect" doctrine, because the award in that case was justified by Congress' exercise of its power under the Fourteenth Amendment, 427 U.S. at 456-57. Most recently, the Court held in *Hutto v. Finney,* 46 U.S.L.W. 4817, 4820 (June 23, 1978), that an award of fees against a state defendant that had acted in bad faith was a proper exercise of the district court's power to enforce its prospective judgment and thus was permitted under the "ancillary effect" doctrine.

Another exception to the Eleventh Amendment's protection of State treasuries is an award authorized by Congress pursuant to section 5 of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976). In *Hutto v. Finney,* supra note 5, 46 U.S.L.W. at 4821, the Supreme Court ruled that "Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment," and that "[w]hen it passed the [Fees] Act, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States."[6] The State contends, however, that Congress' power under the Fourteenth Amendment to override state sovereign immunity extends only to suits in which a party prevails on a *constitutional* claim. On this view, Congress cannot validly authorize a fee award against a state in the absence of a judicial determination that plaintiff had a meritorious constitutional claim. We disagree. We think it is within Congress' Fourteenth Amendment power to authorize a fee award when a party prevails on a statutory claim as long as the pendant constitutional claim is a substantial one and arises out of the same operative facts. Such a fee award furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues. As we understand the Supreme Court decisions, any appropriate means of implementing the Fourteenth Amendment overrides the State's Eleventh Amendment rights, see, e.g., *Fitzpatrick v. Bitzer,* supra, 427 U.S. at 453, 456; *Katzenbach v. Morgan,* 384 U.S. 641, 648-50 (1966). We hold that the authorization of attorneys' fees to be awarded under the standards set forth above is an appropriate way to achieve the competing goals described above. See *Lund v. Affleck,* 587 F.2d 75, 76-77 (1st Cir. 1978); *Bond v. Stanton,* 555 F.2d 172, 174-75 (7th Cir. 1977), cert. denied, 46 U.S.L.W. 3803 (July 3, 1978); *Southeast Legal Defense Group v. Adams,* 436 F. Supp. 891, 893-95 (D. Ore. 1977).

In sum, we find that the Eleventh Amendment does not bar the fee award here, that the district judge correctly interpreted the Fees Act and that the State's arguments in opposition to the award to plaintiff's attorneys are without merit.[7]

IV

We turn now to the cross-appeal, in which plaintiff argues that the district judge abused his discretion by awarding attorneys' fees that were much too low. The fee affidavits stated that plaintiff's two attorneys worked almost 250 hours on the case, of which 58 hours represented time spent on the fee application. If all these hours had been compensated at the customary rate, plaintiff's lawyers would have received over $11,000. The district judge, however, awarded them only $3,012.19. He first determined, on the basis of affidavits regarding customary rates, that a fee of $45.00 an hour was justified. The judge then refused to award any fee for the 58 hours spent on the fee application, disallowed fees for one-half of the remaining time and further reduced the award by 30 percent on the ground that the program employing plaintiff's counsel receives funding under Title XX of the Social Security Act, 42 U.S.C. § 1397 et seq. Plaintiff argues that the district judge abused his discretion in each instance.

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[6] See also *Morrow v. Dillard,* 580 F.2d 1284, 1296-1301 (5th Cir. 1978); *Gates v. Collier,* 559 F.2d 241 (5th Cir. 1977).

[7] The State also argues that plaintiff cannot be considered the prevailing party because she unsuccessfully asserted her claim that she was wrongfully deprived of work-related expense deductions in a state administrative hearing, and thus she is bound by res judicata. However, the State did not make this argument in the district court and it is precluded from raising this new issue on appeal. See *United States v. Friedland,* 391 F.2d 378, 381-82 (2d Cir. 1968), 441 F.2d 855 (2d Cir.), cert. denied, 404 U.S. 867, 914 (1971). In addition, we conclude that this case is not a proper one for application of res judicata, since the State has not established that the identical issues raised in the federal action were litigated in the state administrative proceeding. See *McNellis v. First Federal Savings & Loan Ass'n,* 364 F.2d 251, 257 & n.8 (2d Cir.), cert. denied, 385 U.S. 970 (1966).

The issue whether plaintiff's attorneys can recover fees for services performed in connection with the fee application is an important one, since the question is bound to recur in applications based upon the Fees Act. Chief Judge Clarie apparently felt compelled to disregard the time so spent, since he observed:

> Before applying this rate to the number of hours claimed by Pilver and Shaw, it is *necessary* to subtract the number of hours which were devoted to seeking an award of attorneys' fees, because those hours were spent solely for the attorneys' benefit and did not benefit the plaintiffs. (Emphasis supplied.)

455 F. Supp. at 1349. The issue has arisen in at least two circuit courts of appeals recently, and both have ruled that such time is compensable. See *Lund v. Affleck*, supra, 587 F.2d at 77; *Prandini v. National Tea Co.*, 585 F.2d 47, 52-54 (3d Cir. 1978). There is apparently no controlling authority in this circuit. In *Torres v. Sachs*, 538 F.2d 10 (2d Cir. 1976), which involved an analogous statute, a panel of this court affirmed an award of attorneys' fees that included compensation for time spent on the fee application. See *Torres v. Sachs*, 69 F.R.D. 343, 348 & n.2 (S.D.N.Y. 1975). The panel did so, however, without discussion of the issue.

The question is thus technically open in this court, and we believe there are strong reasons for adopting the approach of the First and Third Circuits. We agree with Judge Garth's statement in *Prandini*, supra, that:

> If an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased. . . . Such a result would not comport with the purpose behind most statutory fee authorizations, *viz*, the encouragement of attorneys to represent indigent clients and to act as private attorneys general in vindicating congressional policies.

585 F.2d at 53. In a decision upon which *Lund v. Affleck*, supra, relied, the First Circuit pointed out that

> [t]o hold otherwise would permit a deep pocket losing party to dissipate the incentive provided by an award through recalcitrance and automatic appeals.

Souza v. Southworth, 564 F.2d 609, 614 (1st Cir. 1977). This observation seems particularly apt in this case, where the State's lawyers on this appeal have devoted the substantial time required to produce over 60 pages of briefs and to make the trip to this court from Hartford, Connecticut, in order to overturn an award of some $3,000. Moreover, the legislative history of the Fees Act impliedly supports this view since the Senate Report cited with approval[8] a district court decision which held that denying attorneys' fees for time spent in obtaining them would "dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to

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[8] Senate Report at 6, [1976] U.S. Code, Cong. & Ad. News at 5913.

gain any fees." *Stanford Daily v. Zurcher,* 64 F.R.D. 680, 683-84 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 547 (1978).

Oddly enough, the State's briefs in this court largely ignore the issues raised by plaintiff's cross-appeal. The State contents itself with a one-paragraph reference to *Lund v. Affleck,* supra, and a quotation from *King v. Greenblatt,* 560 F.2d 1024, 1026 (1st Cir. 1977), cert. denied, 46 U.S.L.W. 3803 (July 3, 1978), that "[w]hat constitutes a reasonable attorney's fee in a particular case shall rest within the sound discretion of the district court." We have no quarrel with that estimable proposition, but the district judge here obviously thought he could not exercise his discretion in evaluating the proper fee for the 58 hours plaintiff's attorneys spent on the fee application. That erroneous view was premised primarily upon two cases where attorneys' fees were based upon the equitable common fund doctrine rather than upon the statutory authorization we have here.[9] Unlike those cases, there is here no potential or actual conflict of interest between counsel seeking attorneys' fees and the persons they represent, since all payments will come from the defendant and will not affect the clients' recovery. See *Prandini v. National Tea Co.,* supra, 585 F.2d at 52-53.[10]

We therefore hold that the district court erred in its constricted view of its own discretion. The judge should have evaluated the worth of the 58 hours excluded from

consideration, since time reasonably spent by plaintiff's attorneys in establishing their fee would be compensable. The exercise of discretion, however, gives the district judge great leeway. If the fee claims are exorbitant or the time devoted to presenting them is unnecessarily high, the judge may refuse further compensation or grant it sparingly. See *Lund v. Affleck,* supra, 587 F.2d at 77. We leave these matters in the first instance to the district court.

Plaintiff's remaining arguments on the cross-appeal require less extended discussion. We do not think it was error for the district court, "in exercising its discretion," to reduce the fee award "to reflect the public contribution of federal funds to the plaintiff's attorneys." 455 F. Supp. at 1349. The court reduced the fee award by 30 percent after finding approximately 30 percent of the Legal Aid Society's funding during the years in which the lawsuit was pending came from Connecticut's program under Title XX of the Social Security Act. Although such a reduction is not mandatory and we do not suggest that it be routinely done, see *Mid-Hudson Legal Services, Inc. v. G. & U, Inc.,* 578 F.2d 34 (2d Cir. 1978), the issue is committed to the sound discretion of the district court. Cf. *EEOC v. Enterprise Association Steamfitters Local 638,* 542 F.2d 579, 593 & n.13 (2d Cir. 1976), cert. denied, 430 U.S. 911 (1977). Plaintiff argues that the reduction here was an abuse of discretion because under the funding program it receives reimbursement for services to particular clients but no application was submitted in connection with this lawsuit.[11] We conclude that it was not an abuse of discretion for the district court to tie the reduction in the fee to the overall percentage of federal funding received by the Legal Aid Society during the years of litigation rather than the funding for the particular case.

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[9] The district judge cited *City of Detroit v. Grinnell Corp.,* 560 F.2d 1093, 1102 (2d Cir. 1977), amended, 575 F.2d 1009 (2d Cir. 1978) and *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.,* 540 F.2d 102, 111 (3d Cir. 1976).

[10] *Prandini* also apparently overruled *Commonwealth of Pennsylvania v. O'Neill,* 431 F. Supp. 700, 705 (E.D. Pa. 1977), aff'd, 573 F.2d 1301 (3d Cir. 1978), the other case relied on by Chief Judge Clarie.

[11] The Legal Aid Society states that it receives federal reimbursement of the cost of 75 percent of the services it performs for eligible clients, and that it never applied for reimbursement for services to Virginia Gagne and her class because it undertook representation in this matter prior to enactment of Title XX.

Finally, we think that the district court did not commit error in disallowing one-half of the hours worked because "the issues involved in the case were relatively simple and most attorneys would not have spent so many hours on the case." 455 F. Supp. at 1349. We recognize that our cases require that "in increasing or decreasing an attorney's compensation, the district judge should set forth as specifically as possible the facts that support his conclusion," *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 169 (2d Cir. 1973) quoted in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 473 (2d Cir. 1974). Nevertheless, under the circumstances we conclude that the court's brief explanation satisfies this requirement. We note that the district court did compare the fee in this case with that awarded in at least one other recent case. 455 F. Supp. at 1349.

In conclusion: On the State's appeal, we affirm the judgment of the district court. On the cross-appeal, we remand for further consideration of the question whether the fee award should be increased to compensate plaintiff's attorneys for their efforts in establishing their right to a reasonable fee.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Ninth day of March, One thousand nine hundred and seventy-nine.

Present:

HON. STERRY R. WATERMAN
HON. WILFRED FEINBERG
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges,

VIRGINIA GAGNE, Individually and on behalf of all others similarly situated,
Plaintiff-Appellee
Cross-Appellant.

v.

78-7414
78-7432

EDWARD MAHER, Commissioner of Social Services, Successor to Nicholas Norton, individually and as Commissioner of Welfare, State of Connecticut and Henry Boyle, individually and as Acting Deputy Commissioner of Welfare,
Defendant-Appellant
Cross-Appellee.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in part and remanded in part in accordance with the opinion of this court, with costs to be taxed against the defendant-appellant cross-appellee Maher.

A. DANIEL FUSARO,
Clerk

By:
ARTHUR HELLER,
Deputy Clerk

A true copy,

A. DANIEL FUSARO,
Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

VIRGINIA GAGNE, individually, and on behalf of all others similarly situated,

Civil No. H75-1

Plaintiff

vs.

EDWARD MAHER, ET AL.

Defendants.

CONSENT DECREE

It is hereby ordered this Second day of March, 1977, that:

1. Judgment may enter in accordance with the provisions of this agreement. Nothing in this Consent Decree is intended to constitute an admission of fault by either party to this action.

2. In determining the availability of income and resources for working AFDC recipients, the defendants agree that they shall take into consideration any expenses reasonably attributable to the earning of income.

3. The defendants agree to publish the heretofore unpublished current day care expense standards. Any other unpublished standard allowance or allowances used by the Department for work-related expenses shall be based upon an evaluation of current prices available in the locality in which the recipient requesting the allowance resides.

4. The defendants agree that any standard allowance or allowances established by the Department, whether published or unpublished, for specific items of expense which are reason-

ably attributable to the earning of income, are not maximum amounts allowed. Working AFDC recipients will be allowed to prove that they incur expenses which are reasonably attributable to the earning of income which are in excess of, or different from, the Department's standard allowance, and upon presentation of such proof to the Department, such actually incurred expense will be allowed.

5. The defendants agree that all standard allowances established by the Department for expenses which are reasonably attributable to the earning of income, by AFDC recipients shall be reviewed annually to determine the currency of their relationship to the cost of living. In the annual report, required by §17-2 of the Connecticut General Statutes, in which the Commissioner of Social Services is required to at least annually compute a redetermination and such revisions to all components of the standards of need for the several programs administered by the Department so as to reflect changes in living costs using the current federal Regional Consumer Price Index, a current computation for all work-related expense standards will be separately included. Where such standards are found to be not reasonably priced, the Commissioner shall so inform the appropriate committee of the General Assembly.

6. The class of persons the plaintiff is seeking to represent shall be certified to include all AFDC recipients in the State of Connecticut who have or claim to have expenses which are reasonably attributable to the earning of income.

7. The defendant agrees that the work-related transportation allowance specified at Connecticut Department of Social Services Policy Manual, Volume I, Chapter III at Index 332.31, 2b(2) and (3) shall be increased, from $.06 per mile to $.12 per mile.

8. The defendant shall automatically increase the aforesaid transportation allowance for all working AFDC recipients who incur the work-related transportation expense listed in said Policy Manual in Index 332.31, 2b(2) and (3), effective March 1, 1977. It shall be implemented as follows:

(a) For all new applicants, after March 1, 1977, the $.12 per mile allowance will be granted immediately.

(b) For currently employed AFDC recipients who are now receiving the $.06 per mile allowance, the increased allowance will be implemented at the time of such recipient's next scheduled or unscheduled case review whichever occurs first, but in no event later than June 1, 1977. A retroactive adjustment to March 1, 1977, will be made for such a recipient by issuing to him or her a separate check in the amount of $.06 a mile or such other greater amount per mile as the recipient was found to be entitled for each mile of travel, from March 1, 1977, to the date of such case review.

9. The Department of Social Services shall mail the Notice attached to this stipulation as exhibit "A" to all AFDC recipients no later than April 1, 1977, and this form will also be mailed to each recipient who is working or is planning to become employed before any and all scheduled face-to-face interviews.

10. At each face-to-face interview, the interviewing worker shall clearly advise each working welfare recipient, that, in determining the availability of income and resources, for purposes of computing the recipient's award, income equal to expenses reasonably attributable to the earnings of income will *not* be included as income to such recipient and will be disregarded by the Department. The interviewing worker will further explain that, although the Department of Social Services has adopted certain standard allowances, recipients may claim expenses greater than or different from those standards if

it can be demonstrated that such expenses are reasonably attributable to the earning of income.

11. After each face-to-face interview, the notice attached hereto as exhibit "B" shall be completed and mailed to the recipient. This notice shall be in addition to and not in lieu of any other notice heretofore required by law.

12. If the working AFDC recipient disagrees with the kind and/or amount of work-related expense allowances allowed, or the computation thereof, he or she may request a fair hearing to challenge the Department's decision. Any decision that would result in the suspension, reduction or discontinuance of public assistance shall be stayed if any evidentiary hearing is requested in writing by the recipient and returned to the Department within ten days of the date of notice.

13. The Department shall modify its regulations and policy to the extent necessary to make them consistent with this stipulation.

14. All notices required by this stipulation shall be printed in both English and Spanish.

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SO ORDERED:

T. EMMET CLARIE, CHIEF
United States District Judge

Supreme Court, U.S.
FILED
NOV 14 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

— 78-1888 —

EDWARD W. MAHER, COMMISSIONER OF
INCOME MAINTENANCE,
STATE OF CONNECTICUT,

Petitioner,

v.

VIRGINIA GAGNE, INDIVIDUALLY AND
ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1979
CERTIORARI GRANTED OCTOBER 1, 1979

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1.

RELEVANT DOCKET ENTRIES

GAGNE v. MAHER

HONORABLE T. EMMET CLARIE

United States District Court

1/3/75

Complaint, filed.

1/28/75

Answer filed.

1/30/75

Defendants Interrogatories to the Plaintiff.

3/4/75

Answers to Interrogatories.

4/4/75

Motion for Leave to Take Depositions by Means of a tape recorder, and Stipulation ordered accordingsly, Markowski, C.m 4/7/75. Copies mailed.

4/14/75

Notice of Deposition (Re: C. Packard 4/21/75).

5/9/75

Interrogatories to Defendants, filed.

6/2/75

Motion to Intervene as a Plaintiff filed by Betty Spain.

7/10/75

Defendants Answer to Interrogatories to Defendants.

9/30/75
Complaint of Betty Spain filed.

10/7/75
Notice of Dismissal by Pltf. Betty Spain.

12/3/75
Notice of Changes in Deposition (Caroline Packard).

12/3/75
Deposition of Caroline E. Packard.

12/29/75
Interrogatories to Defendants.

1/29/76
Suggestion that Successor in Office be Substituted by Pltf.

2/6/76
Answers to Interrogatories filed, by deft.

3/2/76
Defendant's Supplemental Answer to Interrogatories.

4/19/76
Supplemental Answers to Interrogatories filed by def.

9/21/76
Motion for Leave to Amend Complaint.

10/20/76
Answer to Amended Complaint.

12/8/76
Request for Admission filed by Pltf.
Interrogatories to Defendants.

1/24/77
Motion for Certification of Class.

3/2/77
Consent Decree, Clarie, J. m.3/2/77. Copies mailed.

4/4/77
Motion for Attorney's Fees, filed by pltfs.

4/21/77
Defendant's Motion in Opposition to the Plaintiff's Motion for Award of Attorney's Fees-Summary of Defendant's Argument.

5/16/77
Hearing on pltf. motion for atty. fees. Dec. Res. Pltf. Supplement. Affidavit of Joan Silver filed, make Exh. 1, Affidavit of David Shaw filed, made Exh. D-1, Exh. D,E,G,F.

10/11/77
Court Reporter's notes of proceedings held on May 16, 1977, filed on Hartford (Sperber, R.).

8/1/78
RULING on Motion for Attorneys' Fees-GRANTED in amount of $3,012.19 Clarie, J. m.8/2/78. Copies mailed.

8/8/78
Notice of Appeal, filed by Def.

8/8/78
Supersedeas Bond, filed by Def.

8/18/78
Notice of Cross Appeal filed by plaintiff. Copies to counsel. Certified copies of appeal and docket entries mailed to U.S. Court of Appeal and New Haven. Civil Management Plan and Forms C & D mailed to Atty Pilver.

2.

United States District Court

District of Connecticut

VIRGINIA GAGNE, individually
and in behalf of all other
persons similarly situated,
PLAINTIFF;

vs. CIVIL ACTION NO. H 75 1

NICHOLAS NORTON, Commissioner
of Welfare, State of Connecticut,

HENRY BOYLE, Acting Deputy
Commissioner of Welfare, State
of Connecticut,
DEFENDANTS.

COMPLAINT

I. PRELIMINARY STATEMENT

1. Plaintiff, individually and on behalf of all persons similarly situated, seeks injunctive and declaratory relief with regard to certain state regulations which are being applied by the defendants in a way that deprives plaintiff of benefits secured to her by the incentive earnings portion to the Aid to Families with Dependent Children provisions of the Social Security Act (42 U.S.C. sec. 601 et. seq.). The plaintiff, a full-time employee of the Bass Plating Company, Bloomfield, Connecticut, wishes to have her expenses, reasonably attributable to the production of income, fully considered in computing her AFDC award under the incentive earnings program. Defendants, pursuant to State policy set forth at Connecticut Welfare Manual, Volume I, Chapter III, Index 332.31 (effective 9-15-73) (see exhibit A attached and incorporated herein as if fully pleaded) limit work-related expenses by setting maximum food and transportation expense allowances for certain AFDC recipients.

2. The deprivation complained of is caused by defendants' failure to consider all of plaintiff's reasonable work-related expenses in computing her monthly AFDC award. The plaintiff challenges defendants' regulations located at Volume I, Chapter III, Index 332.31 of the Welfare Manual on the grounds that they violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and conflict with the Social Security Act and the regulations promulgated pursuant to it.

II. JURISDICTION

3. Plaintiff's action for declaratory and injunctive relief is authorized by 28 U.S.C. sections 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments, and by 42 U.S.C. section 1983, which provides redress for the deprivation under color of state law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and law of the United States.

4. Jurisdiction is conferred on this Court by 28 U.S.C. section 1343.

III. THREE-JUDGE COURT

5. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. sections 2281, 2284 since plaintiff seeks an injunction to restrain defendants, who are state officers, from the enforcement, operation and execution of a state regulation (Connecticut Welfare Manual Vol. I, Chap. III, Index 332.31) of state-wide applicability on the ground that said statute is contrary to the Constitution of the United States and the Social Security Act.

IV. PLAINTIFF

6. Plaintiff Virginia Gagne is a citizen of the United States and of the State of Connecticut, and a resident of the Town of Bloomfield, Connecticut.

V. DEFENDANTS

7. Defendant Nicholas J. Norton is the Commissioner of Welfare of the State of Connecticut and is entrusted under section 17-3a of the Connecticut General Statutes with the responsibility for the promulgation of rules and regulations for the operation of town assistance and for the supervision of this program.

8. Defendant Henry Boyle is the acting Deputy Commissioner of Welfare of the State of Connecticut and as such is second in charge of the operation and administration of all programs under the jurisdiction of the State Welfare Department.

VI. CLASS ACTION

9. The named plaintiff brings this action in her own behalf and, pursuant to the Federal Rules of Civil Procedure 23a and (b)(2), on behalf of all other persons similarly situated. The members of the class similarly situated are all AFDC recipients in the State of Connecticut whose expenses reasonably attributable to the earning of income are not fully considered in computing their AFDC grant. The requirements of Rule 23 are met in that the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class; and the parties opposing the class have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

VII. FACTS

10. Plaintiff, Virginia Gagne, is a resident of Bloomfield, Connecticut and the mother of four children. She supports herself and her children with income earned at the Bass Plating Co., Bloomfield, Connecticut and incentive earning payments under the Aid to Families with Dependent Children (AFDC) program administered by the State Welfare Department.

11. Virginia Gagne's earned income is reported to and fully taken into consideration by the State Welfare Department in computing her AFDC award.

12. Mrs. Gagne has found it necessary to purchase and maintain a 1963 Ford Fairlaine automobile as a means of travelling to and from work (round trip — 8.4 miles) because public transportation between her home and the Bass Plating Company is inaccessable.

13. The Bass Plating Company allows employees a one-half hour lunch and fifteen minute coffee breaks.

14. Time restrictions and the location of alternative eating establishments (commercial food establishment closest to the Bass Plating Company is approximately three miles away) make it extremely difficult for the plaintiff to purchase work-related food at any location other than her employer's place of business.

15. On August 19, 1974, the plaintiff, through her attorney, represented to her worker that many of her work-related expenses including food and transportation costs were being either improperly excluded from or not fully considered in her incentive earnings computations.

16. Mrs. Gagne was told that certain of the exclusions were improper but that transportation and food allowances were fixed by departmental policy and could not be changed.

17. Plaintiff, aggrieved by this decision to limit her work-related food and transportation allowances to $.50 per day and $.06 per mile respectively and to refuse to consider work-related clothing expenses in computing her AFDC award, requested a Fair Hearing.

18. During negotiations preceeding the September 24, 1974 Fair Hearing, plaintiff renewed her demand that her reasonable work-related transportation and food expenses be fully deducted in her AFDC award computations.

19. The fair hearing liason worker, although willing to make certain changes in Mrs. Gagne's allowable expenses, stated that she could not allow food and transportation expenses exceeding the standards prescribed in Index 332.31, regardless of a recipient's circumstances.

20. It was established at the September 24, 1974 Fair Hearing that is costs Virginia Gagne at least 13.9 cents per mile to operate her automobile for work purposes. The fair hearing officer, using a twelve cents per mile figure, computed her monthly transportation costs to be $21.84 (182 miles times $.12 per mile) — exactly double that allowed by defendants' policy.

21. It was also established at the hearing that plaintiff's reasonable work-related food expenditures are $1.65 per day or $35.75 monthly — more than three times the defendants' monthly lunch allowance.

22. Because of the special circumstances of plaintiff's employment, it would be impossible to obtain transportation or to purchase food reasonably necessary for work for the amounts specified in Index 332.31

23. The fair hearing officer found (see exhibit B attached and incorporated herein as if fully pleaded) that although plaintiff's transportation and food costs greatly exceeded defendants' allowances, the agency was correct in adhering to its policy. No reasons were given for his decision in this regard.

24. On November 26, 1974, the plaintiff's attorney wrote a letter to Henry Boyle, Deputy Commissioner of Welfare, with a copy to Assistant Attorney General Francis MacGregor in an attempt to resolve this dispute (see exhibit C attached and incorporated herein as if fully pleaded). No response to this inquiry has been received.

VIII. FIRST COUNT

25. Paragraphs 1-24 of the complaint are hereby incorporated by reference the same as if fully pleaded.

26. The defendants' regulations at Connecticut State Welfare Manual, Index 332.31 create two classes of working AFDC recipients: one class consists of those recipients whose expenses reasonably attributable to the production of income are fully considered in computing their AFDC grants and the other class consists of recipients whose work-related expenses are not fully considered in computing their AFDC award.

27. These two classes are indistinguishable in light of the purposes of the work expense disregard provisions of the AFDC program — namely, to provide a work incentive for AFDC recipients.

28. Defendants' practice and policy constitute an invidious discrimination against persons whose work-related expenses exceed the allowances set forth in Index 332.31 and violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by forbidding plaintiff and the class she represents ever from controverting the presumption that their work-related expenses exceeding the transportation and food allowances of Index 332.31 are reasonable.

IX. SECOND COUNT

29. Paragraphs 1-28 of the complaint are hereby incorporated by reference the same as if fully pleaded.

30. Despite plaintiff's representations to her worker and subsequently, during negotiations before her September 24, 1974 Fair Hearing, to the Fair Hearings Liason, that special circumstances rendered the Department's transportation and food allowances wholly inadequate and unreasonable in light of her actual work-related expenses, she was told that Departmental Policy required strict adherence to expense guidelines.

31. Although the fair hearing officer found the plaintiff's actual work-related transportation costs to be more than double and her food costs to be more than triple the allowances prescribed by Index 332.31, departmental policy was strictly followed without articulating any reasons therefor.

32. Defendants' practice and policy violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that:

a) Defendants' practice and policy establish an irrebutable presumption that the plaintiff's work-related transportation and lunch allowances are unreasonable and operate to deny plaintiff and the class she represents a fair opportunity to rebut it.

b) The standard lunch and transportation allowances contained in Index 332.31 are arbitrary in that they were not developed by a statistically fair averaging, nor do they reflect current prices.

X. THIRD COUNT

33. Paragraphs 1-32 are incorporated by reference, the same as if fully pleaded.

34. Section 402(a)(7) of the Social Security Act (42 U.S.C.) section 602(a)(7) requires state plans thereunder to provide that, in determining the need for assistance of a recipient, the state agency shall take into consideration any income of such individuals "as well as any expenses reasonable attributable to the earning of any such income".

35. Thus, state agencies are required, in computing individual welfare grants, to disregard from earned income those expenses that can reasonably be termed work-related. 45 C.F.R. sections 233.20(a)(3)(iv)(a).

36. Connecticut General Statutes section 17-83 authorizes the Commissioner of Welfare to make necessary regulations including any regulations necessary for receiving grants from the federal government.

37. Connecticut Welfare Regulations Manual, Vol. I, Chap. III, Index 332.31 establishes maximum lunch and transportation expense allowances for certain AFDC recipients.

38. Recipients are given no meaningful opportunity to show that the established maxima are unreasonable in light of special circumstances relating to their employment.

39. The state regulation (Index 332.31) as administered by Connecticut, by failing to take into consideration all of plaintiff's expenses reasonably attributable to the production of income, conflicts with the federal statutes and regulations and, therefore, violates the Supremacy Clause of the United States Constitution.

XI. PRAYER FOR RELIEF

WHEREFORE, the plaintiff respectfully requests in her own behalf, and in behalf of all those similarly situated, that this Court:

1. Assume jurisdiction of this cause, convene a three-judge district court pursuant to 28 U.S.C. sections 2281 and 2284 to determine this controversy, and set this case down promptly for a hearing.

2. Determine by order, pursuant to Rule 23(c)(l) of the Federal Rules of Civil Procedure, that this action be maintained

as a class action.

3. Enter a final judgment pursuant to 28 U.S.C. sections 2201 and 2202 and Rule 54, 57 and 58 of the Federal Rules of Civil Procedure declaring that defendants' regulation contained at Vol. I, Chap. III, Index 332.31 of Connecticut's Welfare Manual invalid as inconsistent with 42 U.S.C. section 602(a)(7) and 45 C.F.R. section 233.20(a)(3)(iv)(a) and, therefore, violative of the Supremacy Clause of the United States Constitution.

4. Enter a final judgment pursuant to 28 U.S.C. sections 2201 and 2202 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure declaring that the Connecticut Regulations found at Volume I, Chapter III, Index 332.31 are invalid under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

5. Enter a permanent injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from refusing to consider any of plaintiff's or her class's expenses reasonably attributable to the production of income in computing their AFDC awards.

6. Order the defendants, their successors in office, agents and employees, to notify promptly by first class mail at their last known address all persons who have been denied AFDC benefits because of the provisions and interpretations of state and federal law enjoined herein that they are now eligible for such benefits and may reapply.

7. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow plaintiff her costs herein, and also grant her and all persons similarly situated such additional or alternative

relief including payment of all monies wrongfully withheld, as may seem to this Court to be just, proper and equitable.

Dated at Hartford, Connecticut this 30th day of December 1974.

RESPECTFULLY SUBMITTED

By: David C. Shaw
Legal Aid Society of Hartford
County, Inc.
525 Main Street
Hartford, Connecticut 06103
Tel. (203) 566-6360

Attorney for Plaintiff

3.

United States District Court
District of Connecticut

CONNECTICUT
STATE WELFARE DEPARTMENT
PUBLIC ASSISTANCE
HARTFORD

In Re: Request of Virginia Gagne
45 Hillside Avenue
Bloomfield, Connecticut
Case No. 11-C-800558

For fair hearing because of amount of reduction in award.

November 20, 1974

Present: Mrs. Virginia Gagne, Apellant; Atty. David Shaw, Appellant's
Representative; Mrs. Daphne Walker, Fair Hearing Liaison;
Mr. William Kane, Fair Hearing Officer.

MEMORANDUM OF DECISION

Mrs. Gagne, of Bloomfield, Connecticut, also referred to as the appellant, was aggrieved because of amount of reduction in the award and made request for a fair hearing as outlined in Sections 17-2a and 17-2b of Connecticut General Statutes by means of a letter dated August 16, 1974.

Pursuant to said request, a fair hearing was held before the undersigned, at the Hartford District Office of the State Welfare Department, on September 24, 1974, of which due notice had been given and at which hearing the appellant was present and the case was fully heard. The right to appeal the hearing decision within thirty days to the Circuit Court was made known.

A: FOR THE STATE WELFARE DEPARTMENT

The appellant is active on the AFDC incentive earnings program. The appellant's son is also employed full time as well as being a full time student. The district office does not reflect any of his income nor do they allow him any exemptions for work expenses. The appellant is aggrieved with the agency's determination that they do not allow her son the work expenses.

B: FOR THE APPELLANT

The appellant's representative stated that since 9/73 the agency has not properly computed the employment expenses of the appellant and her son. The son has not been allowed any expenses such as transportation for employment and clothing essential to employment. The cost of transportation is monthly, approximately $21.84 and clothing is $3.78 monthly for special work gloves. The appellant herself spends about $35.75 monthly on lunches. The appellant travels approximately 182 miles monthly for work at a cost of 12 to 14 cents per mile. The appellant's representative stated the federal regulations require that actual work expenses be allowed and that the State cannot boose arbitiary [sic] limits. Also the appellant's representative noted the income disregard policy is separate and distinct from the incentive earning policy.

C: PERTINENT LAW

Section 17-82d of the Connecticut General Statutes provides the regulation which authorizes the Commissioner of Welfare to administer the AFDC program and to grant assistance in order to support a family in health and decency.

D: PERTINENT AGENCY POLICY

Volume 1, Chapter III, Index 332 and following provides the policy regarding the treatment of income for those persons in receipt of public assistance.

E: FINDING OF FACT

1. The appellant is employed and a recipient of AFDC. The appellant is therefore entitled to be on the AFDC incentive earning program.

2. The appellant's son is active on AFDC and is a full time student in high school.

3. The appellant is requesting allowance for actual lunch and work clothes expenses as well as transportation.

4. The appellant is requesting that the actual transportation cost and clothing costs of her son also be allowed.

F: CONCLUSION

Expenses of employment are allowed as proper deductions from gross income but are not items of need for which the agency supplements. The agency is also correct in allowing $.50 daily for lunches and $.06 per mile for transportation. The district should also allow the appellant a deduction for work clothing that is necessary for the job. This allowance can not be given to the appellant's son.

G: DECISION

The district is directed to assess the actual needs of the appellant's work connected clothing expenses and to allow those as actual expenses. The district is upheld in the amount allowed the appellant for lunches, transportation and the mandatory deductions. The district is also upheld in not allowing the appellant's son any work expenses.

Mr. William Kane
Official designated to hold
Fair Hearings

WK:gp

cc: Serge Tetera
Act. District Director
D.O. #1
Hartford

Atty. David Shaw

4.

United States District Court
District of Connecticut

(TITLE OMITTED IN PRINTING)

ANSWER

1. So much of paragraph 1 of the plaintiff's complaint as alleges that state regulations are being applied so as to deny the plaintiff of benefits secured to her by the incentive earnings portion of the Aid to Families with Dependent Children provisions of the Social Security Act is denied; as to the remainder of paragraph 1, the defendant has insufficient information to form a belief.

2. Paragraphs 2, 3, 4, and 5 of the plaintiff's complaint are denied.

3. As to paragraph 6 of the plaintiff's complaint, the defendant has insufficient information to form a belief.

4. Paragraphs 7 and 8 of the plaintiff's complaint are admitted, as of the date of the complaint.

5. Paragraph 9 of the plaintiff's complaint is denied.

6. As to paragraphs 10, 11, 12, 13, 14, 15 and 16 of the plaintiff's complaint, the defendant has insufficient information to form a belief.

7. As to paragraph 17 of the complaint, that part of paragraphs 17 that alleges that the plaintiff is aggrieved is denied; that part of paragraph 17 that alleges that the plaintiff requested a fair hearing is admitted.

8. As to paragraphs 18, 19, 20, 21, 22 and 23 of the complaint, the defendant has insufficient information to form a belief.

9. As to paragraph 24 of the complaint, so much as alleges that the plaintiff's attorney wrote to Deputy Commissioner is admitted; as to the remainder of paragraph 24, the defendant has insufficient information to form a belief.

10. As to paragraph 25 of the complaint, the defendant hereby incorporates the answers to paragraphs 1 - 24 by reference.

11. Paragraphs 26, 27 and 28 of the complaint are denied.

12. As to paragraph 29 of the complaint, the defendant hereby incorporates the answers to paragraphs 1 - 28 by reference.

13. As to paragraph 30 of the complaint, the plaintiff has insufficient information to form a belief.

14. As to paragraph 31 of the complaint, the defendant has insufficient information to form a belief.

15. Paragraph 32 of the complaint is denied.

16. As to paragraph 33 of the complaint, the defendant incorporates the answers to paragraphs 1 - 32 by reference.

17. Paragraphs 34, 35, 36 and 37 set forth conclusions of law and not allegations of fact and therefore no answer is necessary but insofar as an answer may be required, defendant denies each and every allegation of fact and conclusion of law that may be contained therein.

18. Paragraphs 38 and 39 of the complaint are denied.

19. All allegations not expressly herein before admitted, denied, or modified are denied.

FIRST DEFENSE

1. The plaintiff has failed to state a cause of action, due to the failure to allege facts giving rise to a constitutional issue sufficiently substantial to vest jurisdiction under 28 U.S.C. § 1343 (3).

2. Because there are no substantial constitutional issues, this court does not have jurisdiction, because the amount in controversy is not $10,000.00 or more, as required by 28 U.S.C. § 1331.

DEFENDANTS

BY THEIR ATTORNEY

CARL R. AJELLO
Attorney General

By: EDMUND C. WALSH
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06114
Tel: 566-7014

(CERTIFICATION OF SERVICE OMITTED)

5.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

ANSWERS TO INTERROGATORIES

1. State the name and address of your present employer.

ANSWER: The Bass Plating Company, 32 Old Windsor Road, Bloomfield, Connecticut.

2. How long have you been employed at your present place of employment?

ANSWER: Since September of 1973.

3. How many hours a week do you work?

ANSWER: Work week varies between approximate limits of sixty-three hours and forty hours.

4. What are the hours of your employment?

ANSWER: Workday hours vary; approximate hours - 7:30 a.m. to 5:00 p.m.

5. What is the shortest direct distance from your home to your job?

ANSWER: 4.2 miles

6. How was the distance in your answer to Question 5 determined?

ANSWER: Automobile odometer reading taken along most direct route.

7. What was your total income, from all sources, for each of the following months?

		Gross Earned Income
ANSWER:	a) July, 1974	$607.87
	b) August, 1974	672.14
	c) September, 1974	633.61
	d) October, 1974	557.18
	e) November, 1974	675.13
	f) December, 1974	558.13
	g) January, 1975	738.04

My monthly AFDC incentive earnings payments have changed repeatedly, particularly since a fair hearing was requested regarding my incentive earning payments. For this reason I believe that I cannot accurately list my incentive earning payments during the period specified with the information at my disposal.

8. Were you a recipient of food stamps for any or all of the periods listed in Question 7? If so, state the amount of money you paid for the food stamps for each of the months listed in Question 7, and the total value of the food stamps received for each month.

ANSWER: No.

9. Does your present employer forbid you to bring your own lunch to work?

ANSWER: No.

10. Do you bring your own lunch to work?

ANSWER: On rare occasion.

11. If your answer to Question 10 is "no", what is your reason for not bringing your own lunch to work?

ANSWER: Irregular working hours make it difficult to anticipate food needs in advance.

12. Explain in detail how you arrived at the figure of $1.65 per day as your reasonable work-related food expenditures in Paragraph 21 of the complaint.

ANSWER: a) Lunch: sandwich — $.95 per day
Coffee — .25 per day

b) Snack breaks: donuts — $.20 per day
Coffee — .25 per day

Total — $1.65 per day

13. Explain in detail how you arrived at the figure 13.9 cents per mile as the cost of operating your automobile for work purposes.

ANSWER:
- a. Work related transportation - 8.4 miles per day.
- b. Cost of gasoline 8 50c per gallon
- c. Gasoline consumption - 13 miles per gallon
- d. Cost of oil - $1.10 per quart
- e. Oil usage - 1 quart every 200 miles
- f. Insurance costs - $157.00 per year
- g. Lubrication and oil change - $5.40
- h. Frequency of lubrication and oil change - every 1000 work miles
- i. Tune-up costs - $25.00
- j. Frequency of tune-ups - once per year
- k. Work miles per year - 2,016 miles

Gasoline cost (b divided by c)	$.0384/mile
Insurance cost (f divided by k)	.0778/mile
Lubrication and oil change cost (g divided by h)	.0054/mile
Oil cost (d divided by e)	.0055/mile
Tune-up cost (i divided by k)	.0124/mile
Totals	$.1395/mile

14. What is the make and model of your automobile?

ANSWER: 1963 Ford Fairlane

15. State in miles the total amount of travel for which your automobile was used for each of the following months: July, 1974 through January, 1975.

ANSWER: Plaintiff has insufficient information to answer this interrogatory.

16. Do you carry insurance on your automobile?

ANSWER: Yes.

17. What is the cost of this insurance?

ANSWER: $155.00 for the period 12/15/74 - 12/15/75.

18. If the answer to Question 16 is "yes", state the name and address of your insurer, the policy number, and the date the policy became effective.

ANSWER: Name and address of insurer
The Hartford Accident and Indemnity Company
Hartford Plaza, Hartford, Connecticut

Policy Number -02GA890254

Date policy became effective - 12/15/74

19. If your answer to Question 16 is in the affirmative, are there any other vehicles insured under this policy?

ANSWER: No.

20. Are there any other automobiles owned, rented or otherwise available to other members of your household?

ANSWER: Yes.

21. If the answer to Question 20 is in the affirmative, describe any such vehicles.

ANSWER: 1968 Oldsmobile Cutlass

22. Have you at any time since July 1, 1974, been employed by anyone other than the Bass Plating Company of Bloomfield? If so, state the name(s) and address(es) of such employer(s) and the period(s) of time during which you were so employed.

ANSWER: No.

23. State the total number of persons living in your household, and the names and relationship of each such person.

ANSWER: Six persons.
Virginia Gagne
James Gagne - Son
Valerie Gagne - Daughter
Scott Gagne - Son
Randall Gagne - Son
Nellie Buck - Mother

24. Are all the members of your household included in your AFDC award?

ANSWER: No.

25. When did you purchase the automobile you presently own?

ANSWER: November 27, 1972

26. What was the mileage reading on your automobile's odometer at the time you purchased it; what is the mileage reading at the present time?

ANSWER: Odometer reading at the time of purchase unknown. Odometer reading now, 37,227.

27. From whom did you purchase said automobile?

ANSWER: Richard A. Gracia

28. What was the purchase price of said automobile?

ANSWER: Precise purchase price is unknown.
Approximate amount $50-$60.

29. What monthly amount of money do you claim was wrongfully disallowed by defendant as a work-related *transportation* expense, and for which months do you make such a claim?

ANSWER: I claim that $24.07 per month minus the monthly transportation expense allowances actually awarded plaintiff since September, 1973 have been wrongfully withheld.

30. What monthly amount of money do you claim was wrongfully disallowed by defendant as a work-related *food* expense, and for which months do you make such a claim?

ANSWER: I claim that $39.74 per month minus the actual monthly lunch allowances actually awarded plaintiff since September, 1973 have been wrongfully withheld.

31. Describe in detail how the amounts given in answer to Questions 29 and 30 were computed.

ANSWER: Interrogatory 29:

a. 2423 work miles per year
b. 634 non-work miles per year
c. 3062 total miles per year
d. Insurance cost - $157 per year
e. Gasoline cost - 50c per gallon
f. Gasoline consumption rate - 13 miles per gallon
g. Oil cost - $1.10 per quart
h. Oil consumption rate - one quart every 200 miles
i. Lubrication and oil change costs - $8.38

j. Frequency of lubrication and oil changes - every 1,000 miles

k. Tune-up cost - $36.00

l. Frequency of tune-ups - once per year - (every 3,062 miles)

m.	Tire cost	$22.00 each
	Federal tax	2.41 each
	Valve	.75 each
	Balancing	1.50 each
	Sales tax	1.32 each
	Total	27.98 each

n. Tire life - 30,000 miles

Gasoline cost - (e divided by f)	$.038 per mile
Insurance cost - (d divided by c)	.051 per mile
Oil cost - (g divided by h)	.006 per mile
Lubrication and oil cost - (i divided by j)	.008 per mile
Tune-up cost - (k divided by c)	.012 per mile
Tire cost - (4m divided by n)	.004 per mile
Total	$.119 per mile

$$\frac{\$.119}{\text{Mile}} \times \frac{2423 \text{ work mi.}}{\text{year}} = \frac{\$288.93 \text{ work cost}}{\text{year}}$$

$$\frac{\$288.93 \ \ \begin{matrix}\text{work}\\ \text{cost}\end{matrix}}{\text{year}} \times \frac{1}{\frac{12 \text{ mos.}}{\text{yr.}}} = \underline{\underline{\$24.07\ \frac{\text{work cost}}{\text{mo.}}}}$$

31. ANSWER: Interrogatory 30:

$$\$1.65 \text{ per day} \times 289\ \frac{\text{working days}}{\text{year}}$$

$$\$1.65 \text{ per day} \times 289\ \frac{\text{working days}}{\text{year}} = \$476.85/\text{year}$$

$$\frac{\$476.85}{(1)\text{ yr.}} \times \frac{1}{\frac{12 \text{ mos.}}{(1)\text{ yr.}}} = \underline{\$39.74} \text{ per month}$$

32. Paragraph 26 of the complaint alleges that the defendant's regulations create two classes of working AFDC recipients.

a) Define with as much precision as you can the class of working AFDC recipients whose expenses, reasonably attributable to the production of income are allegedly fully considered in computing their AFDC grants;

ANSWER: SEE ATTACHED OBJECTION

b) Define with as much precision as you can the class of working AFDC recipients whose expenses are *not* reasonably attributable to the production of income are allegedly fully considered in computing their AFDC grants.

ANSWER: Plaintiff is unaware of any instance where expenses *not* reasonably attributable to the production of income are fully considered by defendants in computing an AFDC recipient's incentive earnings award. We do not allege that any class of such recipients exists.

VIRGINIA GAGNE

(JURAT AND CERTIFICATION OF SERVICE OMITTED)

6.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

DEFENDANTS ANSWER TO INTERROGATORIES TO DEFENDANTS

The defendants hereby reply to the plaintiff's Interrogatories as follows:

1. *QUESTION:* Is it the policy of the Welfare Department of the State of Connecticut (hereinafter — Department) to allow working AFDC recipients a deduction from their gross earnings, less appropriate income disregard, equivalent to all their reasonable work-related expenses, in computing their AFDC incentive earnings award?

***ANSWER:* This is done in accordance with policy found in Manual Vol. I, Chapter III, 332.32, page 2, B., C. and D.**

2. *QUESTION:* Is it the practice of the Department to allow working AFDC recipients a deduction from their gross earnings, less appropriate income disregard, equivalent to all their reasonable work-related expenses, in computing their AFDC incentive earnings award?

***ANSWER:* In practice, the income disregard is allowed less the appropriate employment expenses as spelled out in the above policy.**

3. *QUESTION:* What procedure have intake and redetermination workers been instructed to follow in implementing the policies and practicing referred to in paragraphs 1 and 2 above?

***ANSWER:* All intake and redetermination workers have been instructed to follow all welfare policies accurately including the incentive earnings policy.**

4. *QUESTION:* What procedures have intake and redetermination worker supervisors been instructed to follow in implementing the policies and practices referred to in paragraphs 1 and 2 above?

***ANSWER:* Supervisors have been instructed to follow all welfare policies carefully and they understand that no exceptions are to be made without special approval from appropriate central office personnel.**

5. *QUESTION:* Please identify and summarize the contents of each and every document, memorandum or other writing of any kind which contains any instructions or articulates any policy which relates in any way to the incentive earnings program.

***ANSWER:* See attached Manual Vol. I, Chapter III, Index 332.3 — 332.31 (Appendix A)**

6. *QUESTION:* Please give the name and address of the custodian of each and every document identified in your response to interrogatory 5.

***ANSWER:* Caroline Packard, 110 Bartholomew Avenue, Hartford.**

7. *QUESTION:* How many working AFDC recipients are presently given work-related transportation expense allowances pursuant to Connecticut State Welfare Manual, Chapter III, Index 332.31 which became effective on September 5, 1973 (hereinafter index 332.31)?

***ANSWER:* There is no way of obtaining this information. This information is not put into the computer and it is not administratively possible to go through 38,493 cases to obtain this information at this time.**

8. *QUESTION:* How many working AFDC recipients are presently given the work-related transportation expense allowance identified by index 332.31 (2) (b) (1)?

ANSWER: There is no way of obtaining this information. This information is not put into the computer and it is not administratively possible to go through 38,493 cases to obtain this information at this time.

9. *QUESTON:* How many working AFDC recipients are presently given the work-related transportation expense allowance identified by index 332.31 (2) (b) (2)?

ANSWER: There is no way of obtaining this information. This information is not put into the computer and it is not administratively possible to go through 38,493 cases to obtain this information at this time.

10. *QUESTION:* How many working AFDC recipients are presently given the work-related transportation expenses allowance identified by index 332.31 (2) (b) (3)?

ANSWER: There is no way of obtaining this information. This information is not put into the computer and it is not administratively possible to go through 38,493 cases to obtain this information at this time.

11. *QUESTION:* How many working AFDC recipients presently receive work-related transportation allowances greater than the one specified in index 332.31 (2) (b) (2)?

ANSWER: There is no way of obtaining this information. This information is not put into the computer and it is not administratively possible to go through 38,493 cases to obtain this information at this time.

12. *QUESTION:* How many working AFDC recipients presently receive work-related transportation allowances less than the one specified in index 332.31 (2) (b) (2)?

ANSWER: There is no way of obtaining this information. This information is not put into the computer and it is not administratively possible to go through 38,493 cases to obtain this information at this time.

13. *QUESTION:* How many working AFDC recipients are presently given work-related transportation allowances less than the one specified in index 332.31 (2) (b) (3)?

ANSWER: There is no way of obtaining this information. This information is not put into the computer and it is not administratively possible to go through 38,493 cases to obtain this information at this time.

14. *QUESTION:* How many working AFDC recipients are presently given work-related transportation expense allowances less than the one specified in index 332.31 (2) (b) (3)?

ANSWER: There is no way of obtaining this information. This information is not put into the computer and it is not administratively possible to go through 38,493 cases to obtain this information at this time.

15. *QUESTION:* Does the Welfare Department set any standard work-related transportation allowances for recipients who use public conveyances?

ANSWER: There is no standard transportation allowance for recipients using public conveyances to employment. The actual cost is the figure used. This occassionally includes taxi fares when the recipient is working a shift or weekends when regular public transportation is not available.

16. *QUESTION:* If interrogatory #15 is answered affirmatively, please identify such transportation allowance(s).

ANSWER: See Answer #15.

17. *QUESTION:* If interrogatory #15 is answered affirmatively, are reasonable work-related transportation expense allowances exceeding such standards awarded?

ANSWER: Since the actual cost of transportation is provided, there would be no expenses exceeding the amount charged.

18. *QUESTION:* How many working AFDC recipients who use public conveyances for work transportation are presently given work-related transportation expense allowances greater than the standard allowance identified in your response to interrogatory #16?

ANSWER: There is no way of knowing, but there should be no need for any allowance greater than the standard charge since it is actual cost.

19. *QUESTION:* How many working AFDC recipients who use public conveyances for work transportation are presently given work-related transportation expense allowances less than the standard allowances identified in your response to interrogatory #16?

ANSWER: None to my knowledge.

20. *QUESTION:* Does the Welfare Department always allow the actual cost of necessary work-related public transportation as a work-related expense?

ANSWER: Yes.

21. *QUESTION:* How many working AFDC recipients are presently given the work-related lunch expense allowance identified by index 332.31 (2) (a) (1)?

ANSWER: There is no information available. See Answer #7-14.

22. *QUESTION:* How many working AFDC recipients are presently given work-related lunch expense allowances greater than $.50 per day?

ANSWER: None to my knowledge.

23. *QUESTION:* How many working AFDC recipients are presently given work-related lunch expense allowances less than $.50 per day?

ANSWER: None to my knowledge.

24. *QUESTION:* How many working AFDC recipients are presently given work-related meal expense allowances other than the one identified by index 332.31 (2) (a) (1)?

ANSWER: None to my knowledge.

25. *QUESTION:* Please explain in detail how and when the $.50 per working day lunch allowance located at index 332.31 (2) (a) (1) was first computed and became effective.

ANSWER: This rate was set in October, 1971. In December, 1968, USDA raw food cost for an adult for lunch was $.50 to $.35 per day, depending on family size for lunch for an adult. In determining the amount to be permitted for additional expense of employment, $.50 was considered more than adequate since recipients already had the $.30 for basic food cost in their budget. The total of $.80 would permit a bag lunch plus money for coffee, or the purchase of a lunch. (See Appendix B)

26. *QUESTION:* How many working AFDC recipients are presently given the work-related clothing expense allowance specified in index 332.31 (1)?

ANSWER: There is no way of knowing. See Answer to #7 - #14.

27. *QUESTION:* Has the Welfare Department instructed workers or their supervisors to allow as work-related expenses the cost of tools, materials, uniforms and/or other *special* clothing necessary for the job only up to certain stated maxima?

ANSWER: No.

28. *QUESTON:* Has the Welfare Department delineated any standards for work-related expenses other than those standards listed at index 332.31?

ANSWER: No.

29. *QUESTION:* If interrogatory 28 is answered affirmatively, describe fully each standard and explain how such standards are applied.

ANSWER: See Answer to #28.

30. *QUESTION:* Has the Welfare Department delegated authority to any person or agency to formulate work-related expense standards?

ANSWER: No. The Welfare Commissioner sets standards.

31. *QUESTION:* If interrogatory 30 is answered affirmatively, identify to whom the authority has been delegated and the specific limits that have been placed upon such authority.

ANSWER: Mrs. J. Seckinger is occasionally consulted regarding reasonable allowances for special protective or non-streetwear clothing.

32. *QUESTION:* Does the Welfare Department allow working AFDC recipients deductions from their gross earnings less appropriate income disregards, equivalent to work-related expenses other than those listed at index 332.31, in computing their AFDC incentive earnings awards?

ANSWER: No.

33. *QUESTION:* If interrogatory 32 is answered affirmatively, describe fully each such work-related expense allowed during the past year and the approximate date of each allowance.

ANSWER: See Answer to #32.

34. *QUESTION:* Describe fully each and every guideline that Welfare Department personnel are instructed to follow in deciding whether an administrative exception to the policy defined at index 332.31 should be requested.

ANSWER: There is no written policy regarding exceptions.

35. *QUESTION:* Please identify each and every memorandum, document or other writing, including those directed to fair hearing officials, which explain how the work expenses policies located at index 332.31 (1), (2) (b) (1), (2) (b) (2) and (2) (b) (3) are to be applied.

ANSWER: There is none to my knowledge.

36. *QUESTION:* Please give the name and address of the custodian of each and every writing identified in response to interrogatory 35.

ANSWER: Caroline Packard.

37. *QUESTION:* Please explain in detail how and when the 4½ cents per mile transportation expense allowance formerly located at Connecticut Welfare Manual, Volume I, Chapter III, Index 332.31 (2) (b) (2) and (2) (b) (3) (revised 7/26/71) were first computed and became effective.

ANSWER: Transportation Costs (See Appendix C)

4.5 per mile was provided in 1965 — covered automobile operating costs. There is no information available concerning what it actually covered.

In 1972, when the flat grant was established, the 1965 figured needed to be *updated* by the *percentage* change in actual operating costs from 1965 thru 1969. This was done and the standard was increased to $.05/mile — see attached sheet. This had to be done even though the $.045 covered in excess of actual costs.

Operating Costs	Gas, Oil & Taxes
1965	1969
.0258/mi.	.0276/mi. a 6.97% change

1965 Standard $.045 + $.003 = $0.48 —
new standard 1972 = .05

In 1972, after consultation with State Insurance Department, it was determined that the actual cost of comprehensive No Fault Insurance would run $.019/mile.

1972 Operating Costs - U. S. Dept. of Trans.
(see attached sheet)

Gas, Oil, Taxes	$.034/mi.
No Fault Insurance	.019/mi.
Total	$.053/mi.

On this basis the cost of transportation by car was increased from $.05 to $.06/mi. on 1/1/73.

38. *QUESTION:* Please explain how the five cents per mile transportation expense allowances formerly located at Connecticut Welfare Manual, Volume I, Chapter III, Index 332.31 (2) (b) (2) and (2) (b) (3) (effective 10-1-72) were computed and why increases in the transportation allowances were made.

ANSWER: See Answer #37.

39. *QUESTION:* Please explain in detail how the six cents per mile transportation expense allowances located at Connecticut Welfare Manual, Volume I, Chapter III, Index 332.31 (2) (b) (2) and (2) (b) (3) (effective 9-15-73) were computed and why increases in the transportation allowances were made.

ANSWER: See Answer #37.

40. *QUESTION:* In answering interrogatories #37 through #39 above, please list each and every factor and cost used to compute the 4½, 5, and 6 cents per mile allowances along with a statement of the weight given each factor. In doing so, state specifically whether the following operating costs were considered and, if so, the exact operating costs used along with the weight given each cost in your computations:

(a) gasoline cost
(b) gasoline per mile consumed
(c) routine lubrication cost
(d) cost of oil changes
(e) tune up cost
(f) cost of automobile repairs
(g) cost of automobile liability insurance
(h) automobile depreciation cost
(i) property tax costs
(j) accessory replacement cost
(k) replacement tire cost
(l) oil useage cost
(m) cost of garaging, parking and tolls
(n) license and registration costs

ANSWER: See Answer #37, and also (a) (b) (c) (g) (i)

41. *QUESTION:* Did the Welfare Department rely on any official or unofficial studies or surveys concerning the cost

of operating an automobile or of purchasing meals to compute the work-related expense allowances identified in paragraphs #25, #37, #38, and #39.

ANSWER: Yes, Department of Transportation figures: "Cost of Operating an Automobile" Insurance — Prepared by Insurance Dept. according to D. O. T. Standards.

Meal computation costs related to U. S. D. A. raw food cost standards for an adult in 1969. It was assumed that an additional $.50 provided to the working recipient would allow for a bag lunch plus coffee break money.

42. *QUESTION:* If interrogatory #41 is answered affirmatively, please identify such study or survey.

ANSWER: See Answer #41.

43. *QUESTION:* Please give the name and address of the custodian of each and every survey or study identified in response to interrogatory #42.

ANSWER: Mrs. J. Seckinger.

44. *QUESTION:* Has the Welfare Department made periodic increases in the work related expense allowances identified in index 332.31 because of increases in the cost of living?

ANSWER: No, not since 1973.

45. *QUESTION:* Please identify such increases and the precise manner in which increases in the cost of living were used in the computations described in paragraphs 25, 37, 38 and 39 above.

ANSWER: No increases.

46. *QUESTION:* Please specify the amount of plaintiff's incentive earnings award for each and every month from September of 1973 through March of 1975.

ANSWER: See attached sheet. (Appendix D)

47. *QUESTION:* Please specify the total dollar value of plaintiff's transportation expense allowance used by the Department in her incentive earnings award computations for each and every month during the period September, 1973, through March, 1975.

ANSWER: See attached sheet. (Appendix D)

48. *QUESTION:* How many work miles per day did the department use in computing each and every transportation allowance identified in response to interrogatory #47?

ANSWER: See attached sheet. (Appendix D)

49. *QUESTION:* How many days per week did the department assume plaintiff worked in computing each and every transportation allowance identified in response to interrogatory #47?

ANSWER: Information in record is not clear.

50. *QUESTION:* Please specify the total dollar value of plaintiff's lunch expense allowance used by the Department in computing her incentive earnings award for each and every month during the period September, 1973, through March, 1975.

ANSWER: See attached sheet. (Appendix D)

51. *QUESTION:* How many days per week did the department assume plaintiff worked in computing each and every lunch allowance identified in response to interrogatory #50?

ANSWER: 5 days per week from 11/14 to present.

52. *QUESTION:* For what reasons were the work-

related expense policies located at index 332.31 changed between the years 1970 through 1974 so as to increase the number of work expenses specifically allowed?

ANSWER: In 1971, Department went to a flat work expense allowance. This was disallowed by a federal court ruling. Policy then changed to use specific allowances following federal regulation guidelines and intent was to allow expenses reasonably attributable to employment.

53. *QUESTION:* For what reason was the work-related expense located at Index 332.31 (1) (effective 10-1-71) relating to special safety devices needed for handicapped workers deleted from Index 332.31 (1) (revised 9-11-73)?

ANSWER: It was felt such wording singling out the handicap was superfluous and not needed, and these expenses would be covered by items included in 332.31-1.

Dated at Hartford, Connecticut, this day of July, 1975.

EDWARD MAHER
Defendant Commissioner of
Social Services

By: CAROLINE E. PACKARD

7.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

ANSWERS TO INTERROGATORIES

1. *QUESTION:* Is it the policy of the Department of Social Services of the State of Connecticut (hereinafter - Department) in accordance with their new incentive earnings policy found in Manual Vol. 1, Chapter III, 332.3 - 332.31, (hereinafter - new index 332.3 *et seq.*) revised May 29, 1975 to allow working AFDC recipients a deduction from their gross earnings, less appropriate income disregards, equivalent to all their reasonable work-related expenses, in computing their AFDC incentive earnings award?

1. *ANSWER:* It is the policy of the Department of Social Services to allow a deduction from gross earnings, after the application of the appropriate disregard of any expense(s) reasonably attributable to the earning of such income.

2. *QUESTION:* Is it the practice of the Department, in accord with their new policy found at new index 332.3 *et seq.*, to allow working AFDC recipients a deduction from their gross earnings, less appropriate income disregards, equivalent to all their work-related expenses, in computing their AFDC incentive earnings award?

2. *ANSWER:* It is the practice of the Department of Social Services to allow a deduction from gross earnings, after the application of the appropriate disregard of any expense(s) reasonably attributable to the earning of such income.

3. *QUESTION:* What procedure have intake and redetermination workers been instructed to follow in implementing the new policy and practice referred to in paragraphs 1 and 2 above?

3. ***ANSWER:*** The policy set forth in the revised index 332.31 of the Policy Manual is clearly marked and self-implementing and intake and redetermination workers are required to apply all pertinent policy in processing applications and in making redeterminations.

Supervisors have weekly meetings with workers assigned to them to discuss and review in detail all new or revised policy.

4. ***QUESTION:*** What procedures have intake and redetermination worker supervisors been instructed to follow in implementing the new policy and practice referred to in paragraphs 1 and 2 above?

4. ***ANSWER:*** See Answer to Question #3.

5. ***QUESTION:*** Have intake or redetermination workers or their supervisors been instructed to inform working AFDC recipients of their right to claim deductions for work related expenses in addition to the amounts or items referred to at new index 332.3 *et seq.* at eligibility determinations or redeterminations?

5. ***ANSWER:*** See Answer to Question #3.

6. ***QUESTION:*** Do intake or redeterminations workers or their supervisors have the authority to allow as deductions from income, expenses other then those listed under new index 332.31 (1) and (2) where they determine such expenses are reasonably attributable to the earning of income?

6. ***ANSWER:*** No, this is the responsibility of the Deputy Commissioner. See index 332.31 (3).

7. ***QUESTION:*** If intake or redetermination workers or their supervisors have the authority to allow as deductions from income, expenses other then those listed under new index 332.31(1) and (2), have any standards or guidelines been enunciated to guide them in determining when an expense is reasonably attributable to the earning of income?

7. *ANSWER:* See Answer to Question #6.

8. *QUESTION:* If interrogatory 6 is answered affirmatively, please delineate such standards or guidelines fully.

8. *ANSWER:* See Answer to Question #6.

9. *QUESTION:* If interrogatory 6 is answered negatively, are such workers or their supervisors instucted to deny requests for types of work related expense deductions not listed at new index 332.31(1) and (2)?

9. *ANSWER:* No. See index 332.31(3).

10. *QUESTION:* Do intake or redeterminations workers or their supervisors have the authority to refer requests for types of work-related expense deductions not listed at new index 332.31 (1) or (2) to the Deputy Commissioner for consideration pursuant to new index 332.31(3)?

10. *ANSWER:* Yes, they are required to do so.

11. *QUESTION:* If interrogatory 9 is answered affirmatively, please describe the procedure fully.

11. *ANSWER:* See Answer to Question #9.

12. *QUESTION:* If interrogatory 9 is answered affirmatively, please delineate each and every standard and guideline which workers or their supervisors are instructed to follow in determining whether such requests to the Deputy Commissioner are to be made?

12. *ANSWER:* See Answer to Question #9.

13. *QUESTION:* Do fair hearing officials have the authority to allow work-related expense deductions other than those listed at new index 332.31(1) and (2) where they determine such expenses are reasonably attributable to the earning of income?

13. ***ANSWER:*** Yes if index 332.31(1) (2) and (3) has been complied with.

14. ***QUESTION:*** If interrogatory 13 is answered negatively, are fair hearing officials instructed to deny requests for types of work-related expense deductions not listed at the new index 332.31 (1) and (2)?

14. ***ANSWER:*** See Answer to Question #3.

15. ***QUESTION:*** Can fair hearing officials refer requests for types of work-related expense deductions not listed at new index 332.31(1) or (2) to the Deputy Commissioner for consideration pursuant to the new index 332.31(3)?

15. ***ANSWER:*** No. New claims not made to the district office cannot be presented for the first time at the fair hearing.

16. ***QUESTION:*** If interrogatory 15 is answered affirmatively, please describe the procedure fully.

16. ***ANSWER:*** See Answer to Question #15.

17. ***QUESTION:*** If interrogatory 15 is answered affirmatively, please delineate each and every standard and guideline which fair hearing officials are instructed to follow in determining whether such requests to the Deputy Commissioner are to be made?

17. ***ANSWER:*** See Answer to Question #15.

18. ***QUESTION:*** Do fair hearing officials refer requests for work-related expense allowances to home management consultants whenever allowance standards do not appear in new index 332.3 *et seq.*

18. ***ANSWER:*** No. See Answer to Question #15.

19. ***QUESTION:*** If interrogatory 30 is answered affirmatively, please delineate each and every standard and guideline which fair hearing officials are instructed to follow in determining whether such referrals to a home management consultant are to be made?

19. ***ANSWER:*** The defendant-commissioner is seeking a protective order from the court so as not to be required to answer interrogatory #30.

20. ***QUESTION:*** Please explain fully each and every standard and guideline used by home management consultants to formulate allowances for work-related expenses.

20. ***ANSWER:*** It would be impossible to enumerate every standard and guideline used by the home management consultant to formulate allowances for work-related expenses. If a specific request is made, the home management consultant refers to current Sears Roebuck mail order catalogue to determine the fair cost of the item. In addition, the home management consultant consults by telephone with retail outlets and makes personal inspections for the specific item in question.

21. ***QUESTION:*** If interrogatory 30 is answered affirmatively are fair hearing officials authorized to award reasonable work-related expenses exceeding standards formulated by home management consultants?

21. ***ANSWER:*** See Answer to Question #19.

22. ***QUESTION:*** Please identify and summarize the contents of each and every document, memorandum or other writing of any kind which contains any instructions or articulates any policy which related in any way to the incentive earnings program, as amended May 29, 1975.

22. ***ANSWER:*** See Incentive Earnings Kit which is attached as Appendix A. IRS Circular E (Employer's Tax Guide) Rev. April 1975, has been omitted from this Appendix.

23. *QUESTION:* Please give the name and address of the custodian of each and every document identified in your response to interrogatory 22.

23. *ANSWER:* Miss Caroline Packard, % Department of Social Services, 110 Bartholomew Street, Hartford, Connecticut.

24. *QUESTION:* How many working AFDC recipients are presently given work-related transportation expense allowances pursuant to index 332.31 (2) b1, and b2 as amended May 29, 1975?

24. *ANSWER:* The Department of Social Services does not keep statistical information of this kind. In order to obtain the information requested, the Department would have to make a search of more than 4,500 individual case records in the various district offices throughout the State. Such an undertaking would require the expenditure of hundreds of man hours be Department personnel, at a time when the Department is under severe pressure to handle its work load, because of the abnormally high case load attributable in large measure to the depressed state of the economy and the ensuing high rate of unemployment. Consequently, the defendant is seeking to have the court enter a protective order which will not require the defendant to undertake to provide this information.

25. *QUESTION:* How many working AFDC recipients are presently given work-related transportation expense allowances greater than the one specified in index 332.31 (2)(b) 1, and 2, as amended May 29, 1975.

25. *ANSWER:* See Answer to Question #24.

26. *QUESTION:* How many working AFDC recipients are presently given the work-related lunch expense allowance identified at index 332.31 (2)(a) 1, as amended May 29, 1975?

26. *ANSWER:* See Answer to Question #24.

27. *QUESTION:* How many working AFDC recipients are presently given the work-related lunch expense allowances greater than 50 cents a day?

27. *ANSWER:* See Answer to Question #24.

28. *QUESTION:* How many working AFDC recipients are presently given work-related meal expense allowances other then the one identified by index 332.31 (2)(a)(1), as amended May 29, 1975?

28. *ANSWER:* See Answer to Question #24.

29. *QUESTION:* How many working AFDC recipients are presently given the work-related clothing expense allowances specified in index 332.31 (1), as amended May 29, 1975?

29. *ANSWER:* See Answer to Question #24.

30. *QUESTION:* How many working AFDC recipients are presently receiving a work-related clothing allowance, for clothing needed for work that is neither a uniform or *special* protective clothing, pursuant to index 332.31 as amended May 29, 1975?

30. *ANSWER:* See Answer to Question #24.

31. *QUESTION:* For what reason was the word "protective" added so that it precedes the word "clothing" under index 332.31 (1) as amended May 29, 1975?

31. *ANSWER:* The word "protective" precedes the word "clothing" in index 332.31 to indicate that the Department will allow, as a work expense reasonably attributable to the earning of income, the cost of clothing which is necessary for the protection of the worker and/or for the protection of the

worker's clothing if the worker does not wear special work-clothing on the job. For example, if a worker wears a required uniform, this would be considered special work-clothing. If a worker wears regular or "street" clothing on the job, an allowance for a protective apron could be made if working conditions are such that a worker's regular clothing is subjected to abnormal damage, soiling or staining.

32. *QUESTION:* Does the Department allow working AFDC recipients deductions from their gross earning less appropriate income disregards, equivalent to work-related expenses, other than those listed at index 332.31, as amended May 29, 1975, in computing their AFDC incentive earnings award?

32. *ANSWER:* No.

33. *QUESTION:* If interrogatory 22 is answered affirmatively, describe each such work-related expense as has been allowed since May 29, 1975, and when such allowance was made.

33. *ANSWER:* See Answer to Question #32.

34. *QUESTION:* Does the Department allow AFDC recipients deductions from their gross earnings equivalent to the reasonable work-related transportation expenses identified at index 332.31 (2)(b)(2) and (2)(b)(3) exceeding $.06 per mile.

34. *ANSWER:* Yes, if index 332.31 is complied with.

35. *QUESTION:* Does the Department allow AFDC recipients deductions from their gross earnings equivalent to reasonable work-related food expenses exceeding $.50 per day?

35. *ANSWER:* See Answer to Question #34.

36. *QUESTION:* Subsequent to the adoption of new index 332.3 *et seq.* were attempts made to determine if any working AFDC recipients were entitled to greater work-related expense allowances.

36. *ANSWER:* No.

37. *QUESTION:* If the answer to interrogatory 36 is affirmative, give a complete description of the department's efforts to determine if any working AFDC recipients were entitled to greater work-related expense allowances.

37. *ANSWER:* See Answer to Question #36.

38. *QUESTION:* Please give the name and address of each and every document, memorandum or other writing of any kind which contains any instructions or articulates any policy which relates in any way to department efforts specified in response to interrogatory 37.

38. *ANSWER:* See Answer to Question #36.

39. *QUESTION:* Please give the name and address of the custodian of each and every document identified in response to interrogatory 37.

ANSWER: See Answer to Question #23.

EDWARD W. MAHER
Commissioner of Social Services
Department of Social Services

By: CAROLINE E. PACKARD
Chief, Policy Development
Department of Social Services

(JURAT OMITTED)

8.

United States District Court

District of Connecticut

VIRGINIA GAGNE, Individually
and on behalf of all others
similarly situated

vs Civil No. H-75-1

EDWARD W. MAHER, Commissioner
of Welfare, et al

RULING ON PLAINTIFF'S MOTION TO COMPEL ANSWERS AND DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

The plaintiff's motion of January 29, 1976, requests that the Court order the defendant Welfare Commissioner to answer Interrogatories Nos. 24 through 30, filed by the plaintiff on December 29, 1975. The defendant responded with a motion for a protective order, claiming that were it to be required to answer would be unduly burdensome, because it would require the examination of 4,500 files in already overburdened district offices across the State.

After reviewing the respective pleadings of the parties, the memoranda filed with the motions, and having heard the arguments of counsel, the Court finds that a fair sampling of one large urban district office and one smaller semi-rural office, covering the information sought, should be adequate to serve the plaintiff's purpose. Therefore, it is ORDERED that the defendant shall answer Interrogatories Nos. 24 through 30 for all information requested covering the Hartford and Norwich District Offices. The survey of those two district offices should provide an adequate and meaningful response, to satisfy the

plaintiff's purposes, and at the same time not be overly burdensome.

Compliance shall be had within twenty (20) days.
SO ORDERED.

Dated at Hartford, Connecticut, this 4th day of March, 1976.

T. EMMET CLARIE
Chief Judge

9.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

SUPPLEMENTAL ANSWERS TO INTERROGATORIES

Pursuant to the Court's order of March 4, 1976, the following are the Answers to Interrogatories, Numbers 24 through 30, covering the Hartford and Norwich district offices of the Department of Social Services. This information has already been sent to counsel for plaintiffs on March 31, 1976.

24. *QUESTION:* How many working AFDC recipients are presently given work-related transportation expense allowances pursuant to index 332.31(2) b1, and b2, as amended May 29, 1975?

ANSWER:	Hartford District Office	1148
	Norwich District Office	321
	Total	1469

25. *QUESTION:* How many working AFDC recipients are presently given work-related transportation expense allowances greater than the one specified in index 332.31 (2)(b) 1, and 2, as amended May 29, 1975?

ANSWER:	Hartford District Office	1
	Norwich District Office	0

26. *QUESTION:* How many working AFDC recipients are presently given the work-related lunch expense allowance identified at index 332.31 (2)(a) 1, as amended May 29, 1975?

ANSWER:	Hartford District Office	1083
	Norwich District Office	294
	Total	1377

27. *QUESTION:* How many working AFDC recipients are presently given the work-related lunch expense allowances greater than 50-cents a day?

ANSWER:	Hartford District Office	1
	Norwich District Office	0

28. *QUESTION:* How many working AFDC recipients are presently given work-related meal expenses allowances other than the one identified by index 332.31 (2)(a)(1), as amended May 29, 1975?

ANSWER:	Hartford District Office	None
	Norwich District Office	None

29. *QUESTION:* How many working AFDC recipients are presently given the work related clothing expense allowances specified in index 332.31 (1), as amended May 29, 1975?

ANSWER:	Hartford District Office	85
	Norwich District Office	36
	Total	121

30. *QUESTION:* How many working AFDC recipients are presently receiving a work-related clothing allowance, for clothing needed for work that is neither a uniform or *special* protective clothing, pursuant to index 332.31 as amended May 29, 1975?

ANSWER:	Hartford District Office	0
	Norwich District Office	0

EDWARD W. MAHER
Commissioner of Social Services
Department of Social Services

By: CAROLINE E. PACKARD, *Chief*
Policy Department
Department of Social Services

(JURAT OMITTED)

10.

United States District Court

District of Connecticut

(TITLE OMITTED IN PRINTING)

AMENDED COMPLAINT

I. PRELIMINARY STATEMENT

1. Plaintiff, individually and on behalf of all persons similarly situated, seeks injunctive and declaratory relief with regard to certain state regulations which are being applied by the defendants in a way that deprives plaintiff of benefits secured to her by the incentive earnings portion of the Aid to Families with Dependent Children provisions of the Social Security Act (42 U.S.C. Sec. 601 et. seq.). The plaintiff, Virginia Gagne, is a full-time employee of the Bass Plating Company, Bloomfield, Connecticut. Plaintiff wishes to have her expenses, reasonably attributable to the production of income, fully considered in computing her AFDC award under the incentive earnings program. Defendant has implemented its incentive earnings policy set forth at Connecticut Welfare Manual, Volume I, Chapter III, Index 332.31 (effective 9-15-73) (see exhibit A attached and incorporated herein as if fully pleaded) as amended on May 31, 1975 (see exhibit B attached and incorporated herein as if fully pleaded) so as to limit work related expense allowances. Plaintiffs claim that defendant so limits expense allowances: (a) by limiting their earned income disregards equivalent to those expenses listed in Department Policy; (b) by not adopting procedures reasonably calculated to inform recipients as to whether their requests for expenses other than those listed in Department Policy have been granted or denied or of their right to challenge adverse determinations in a fair hearing, and (3) by not renewing and upgrading transportation and lunch allowances provided in the policy which bear no relation to the actual cost of transportation and lunches in present day economy.

2. Plaintiffs challenge defendant's incentive earnings policies and practices located at Volume I, Chapter III, Index 332.31 of the Connecticut Welfare Manual on the grounds that they violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and conflict with the Social Security Act and regulations promulgated pursuant to it.

II. JURISDICTION

3. Plaintiff's action for declaratory and injunctive relief is authorized by 28 U.S.C. sections 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments, and by 42 U.S.C. section 1983, which provides redress for the deprivation under color of state law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

4. Jurisdiction is conferred on this Court by 28 U.S.C. section 1343.

III. THREE-JUDGE COURT

5. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. sections 2281, 2284 since plaintiff seeks an injunction to restrain defendants, who are state officers, from the enforcement, operation and execution of a state regulation (Connecticut Welfare Manual Volume I, Chapter III, Index 332.31) of state-wide applicability on the ground that said statute is contrary to the Constitution of the United States and the Social Security Act.

IV. PLAINTIFF

6. Plaintiff Virginia Gagne is a citizen of the United States and of the State of Connecticut, and a resident of the Town of Bloomfield, Connecticut.

V. DEFENDANTS

7. Defendant, Edward W. Maher, is the Commissioner of Welfare of the State of Connecticut and is entrusted under section 17-3a of the Connecticut General Statutes with the responsibility for the promulgation of rules and regulations for the operaton of town assistance and for the supervision of this program.

VI. CLASS ACTION

8. The named plaintiff brings this action in her own behalf and, pursuant to the Federal Rules of Civil Procedure 23a and (b) (2), on behalf of all other persons similarly situated. The members of the class similarly situated are all AFDC recipients in the State of Connecticut whose expenses reasonably attributable to the earning of income are not fully considered in computing their AFDC grant. The requirements of Rule 23 are met in that the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class; and the parties opposing the class have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole. Counsel for the plaintiff will adequately represent the interest of the class.

VII. FACTS

9. Plaintiff, Virginia Gagne, is a resident of Bloomfield, Connecticut and the mother of four children. She supports herself and her children with income earned at the Bass Plating Company, Bloomfield, Connecticut and incentive earning payments under the Aid to Families with Dependent Children (AFDC) program administered by the State Welfare Department.

10. Virginia Gagne's earned income is reported to and fully taken into consideration by the State Welfare Department in computing her AFDC award.

11. Mrs. Gagne has found it necessary to purchase and maintain a 1963 Ford Fairlaine automobile as a means of travelling to and from work (round trip - 8.4 miles) because public transportation between her home and the Bass Plating Company is inaccessable.

12. The Bass Plating Company allows employees a one-half hour lunch and fifteen minute coffee breaks.

13. Time restrictions and the location of alternative eating establishments (commercial food establishment closest to the Bass Plating Company is approximately three miles away) make it extremely difficult for the plaintiff to purchase work-related food at any location other than her employer's place of business.

14. On August 19, 1974, the plaintiff, through her attorney, represented to her worker that many of her work-related expenses including food and transportation costs were being either improperly excluded from or not fully considered in her incentive earnings computations.

15. Mrs. Gagne was told that certain of the exclusions were improper but that transportation and food allowances were fixed by departmental policy and could not be changed.

16. Plaintiff, aggrieved by this decision to limit her work-related food and transportation allowances to $.50 per day and $.06 per mile respectively and to refuse to consider work-related clothing expenses in computing her AFDC award, requested a Fair Hearing.

17. During negotiations preceding the September 24, 1974 Fair Hearing, plaintiff renewed her demand that her reasonable work-related transportation and food expenses be fully deducted in her AFDC award computations.

18. The fair hearing liaison worker, although willing to make certain changes in Mrs. Gagne's allowable expenses, stated that she could not allow food and transportation expenses exceeding the standards prescribed in Index 332.31, regardless of a recipient's circumstances.

19. It was establishd at the September 24, 1974 Fair Hearing that is costs Virginia Gagne at least 13.9 cents per mile to operate her automobile for work purposes. The fair hearing officer, using a twelve cents per mile figure, computed her monthly transportation costs to be $21.84 (184 miles times $.12 per mile) — exactly double that allowed by defendants' policy.

20. It was also established at the hearing that plaintiff's reasonable work-related food expenditures are $1.65 per day or $35.75 monthly — more than three times the defendants' monthly lunch allowance.

21. Because of the special circumstances of plaintiff's employment, it would be impossible to obtain transportation or to purchase food reasonably necessary for work for the amounts specified in Index 332.31.

22. Plaintiff further submitted evidence to the fair hearing official that the circumstances of her employment made it necessary for her to work with harsh chemicals that destroy work clothing and shoes. It was established that a modest estimate of her additional clothing needs was $10.00 a month.

23. The fair hearing officer found (see Exhibit B attached and incorporated herein as if fully pleaded) that although plaintiff's transportation, clothing and food costs greatly exceeded defendants' allowances, the agency was correct in adhering to its policy. No reason were given for his decision in this regard.

24. On November 26, 1974, the plaintiff's attorney wrote a letter to Henry Boyle, Deputy Commissioner of Welfare, with a copy to Assistant Attorney General Francis MacGregor in an attempt to resolve this dispute (see Exhibit C attached and incorporated herein as if fully pleaded). No response to this inquiry has been received.

25. On or about May 31, 1975, the Connecticut Department of Social Services amended its policies so as to include the statement that reasonable work-related expenses different from or greater than those specified at Index 332.31 could be awarded by the Deputy Commissioner's office of the Department of Social Services (see attached Exhibit D incorporated herein as if fully pleaded).

26. Defendant's new policy has been implemented in such a manner that reasonable work-related expenses different from or greater than those listed at Index 332.31 are routinely disallowed.

27. Department policy requires face-to-face redeterminations semiannually.

28. Plaintiff has undergone face-to-face redeterminations on February 10, 1976, and August 15, 1976. The redetermination workers hurriedly secured verification of income changes, but did not discuss changes in her work-related expenses or inform her that she could claim expenses different from or greater than those specified in department policy.

29. Plaintiff subsequently received Form W-52T indicating changes in the amount of her AFDC award (see attached Exhibits E and F incorporated herein as if fully pleaded).

30. Said Forms W-52 T are so designed that plaintiff cannot determine whether her work-related expense allowances are reasonable in light of her actual expenses.

VIII. FIRST CAUSE OF ACTION:

Paragraphs 1 through 30 are hereby incorporated by reference as paragraphs 1 through 30 of the FIRST CAUSE OF ACTION, the same as if fully pleaded.

31. Section 402(a)(7) of the Social Security Act (42 U.S.C. Section 602(a)(7)) requires state plans thereunder to provide that, in determining the need for assistance of a recipient, the state agency shall take into consideration any income of such individuals "as well as any expenses reasonably attributable to the earning of any such income."

32. Thus, state agencies are required, in computing individual welfare grants, to disregard earned income equivalent to those expenses that can reasonably be termed work-related. 45 C.F.R. Section 233.20(a)(3)(iv)(a).

33. Connecticut General Statutes Section 17-83 authorizes the Commissioner of Welfare to make regulations including those regulations necessary to receive grants from the federal government.

34. Connecticut Department of Social Services Manual, Volume I, Chapter III, Index 332.31 specifies types of allowable work-related and standard lunch and transportation expenses.

35. These regulations are applied by defendant in such a manner that recipients are not awarded reasonable work-related expenses greater than or different from the standard allowances specified in department policy.

36. Recipients are afforded no meaningful opportunity to show reasonable work-related expenses different from or greater than those specified in department policy.

37. The state regulation (Index 332.31) as administered by Connecticut, by failing to take into consideration all of plaintiff's expenses reasonably attributable to the production of income, conflicts with the federal statutes and regulations and violates the Supremacy Clause of the United States Constitution.

IX. SECOND CAUSE OF ACTION:

Paragraphs 1 through 37 of the FIRST CAUSE OF ACTON are hereby incorporated by reference as paragraphs 1 through 37 of the SECOND CAUSE OF ACTION, the same as if fully pleaded.

38. Connecticut Department of Social Service Manual, Volume I, Chapter III, Index 332.31 establishes lunch and transportation expense allowance standards for certain AFDC recipients.

39. Defendant's manual further specifies types of work-related expenses for which deductions from earned income of AFDC recipients can be made.

40. Defendant's policy is that allowances can be made for work-related expenses greater than or different from those listed at Index 332.31 only if recipients present such claims to workers in writing and that such written requests are forwarded to the Deputy Commissioner's office before they are presented at a fair hearing.

41. Defendant neither informs working AFDC recipients of their right to claim expense deductions other than those specified in department policy, that such claims must be presented in writing or that they must be presented to the Deputy Commissioner before a fair hearing can be won on the issue.

42. Defendant's notification of action (Form W-52T) issued after initial or redetermination interviews fails to notify working AFDC recipients as to whether their claims for reasonable work-related expenses greater than or different from those specified in department policy have been awarded in any meaningful manner and that AFDC recipients have a right to challenge adverse determinations on claims for work-related expense deductions.

43. Defendant's practices and policies violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that:

a) Defendant's practices and policies establish an irrebutable presumption that plaintiff's reasonable work-related transportation, lunch and clothing expenses different from or greater than those specified at Index 332.31 are unreasonable and operate to deny plaintiff and the class she represents a fair opportunity to rebut it.

b) The standard lunch and transportation allowances specified at Index 332.31 are arbitrary and unreasonable in that they were not developed by a statistically fair averaging, nor do they reflect current prices.

c) Defendants have failed to adopt procedures reasonably calculated to inform working AFDC recipients as to whether their claims for reasonable work-related expenses greater than or different from those specified at Index 332.31 have been denied and their right to challenge any adverse determination in a fair hearing.

X. THIRD CAUSE OF ACTION

Paragraphs 1 through 43 of the SECOND CAUSE OF ACTION are hereby incorporated by reference as paragraphs 1 through 43 of the SECOND CAUSE OF ACTION, the same as if fully pleaded.

44. The defendants' regulations at Connecticut State Welfare Manual, Index 332.31 create two classes of working AFDC recipients: one class consists of those recipients whose expenses reasonably attributable to the production of income are fully considered in computing their AFDC grants and the other class consists of recipients whose work-related expenses are not fully considered in computing their AFDC award.

45. These two classes are indistinguishable in light of the purposes of the work expense disregard provisions of the AFDC program — namely, to provide a work incentive for AFDC recipients.

46. Defendants' practice and policy which constitute an invidious discrimination against persons whose work-related expenses exceed the allowances set forth in Index 332.31 and violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by forbidding plaintiff and the class she represents ever from controverting the presumption that their work-related expenses exceeding the transportation and food allowances of Index 332.31 are unreasonable.

XI. PRAYER FOR RELIEF

WHEREFORE, the plaintiff respectfully requests in her own behalf, and in behalf of all those similarly situated, that this Court:

1. Assume jurisdiction of this cause, convene a three-judge district court pursuant to 28 U.S.C. sections 2281 and 2284 to determine this controversy, and set this case down promptly for a hearing.

2. Determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.

3. Enter a final judgment pursuant to 28 U.S.C. sections 2201 and 2202 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure declaring that defendants' regulation contained at Volume I, Chapter III, Index 332.31 of Connecticut's Welfare Manual invalid as inconsistent with 42 U.S.C. section 602 (a)(7) and 45 C.F.R. section 233.20(a)(3)(iv)(a) and, therefore, violative of the Supremacy Clause of the United States Constitution.

4. Enter a final judgment pursuant to 28 U.S.C. sections 2201 and 2202 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure declaring that the Connecticut Regulations found at Volume I, Chapter III, Index 332.31 are invalid under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

5. Enter a permanent injunction pursuant to Rule 65 of the

Federal Rules of Civil Procedure, enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from refusing to consider any of plaintiff's or her class's expenses reasonably attributable to the production of income in computing their AFDC awards.

6. Order the defendants, their successors in office, agents and employees, to notify promptly by first class mail at their last known address all persons who have been denied AFDC benefits because of the provisions and interpretations of state and federal law enjoined herein that they are now eligible for such benefits and may reapply.

7. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow plaintiff her costs herein, and also grant her and all persons similarly situated such additional or alternative relief including payment of all monies wrongfully withheld, as may seem to this Court to be just, proper and equitable.

Dated at Hartford, Connecticut this 10th day of September, 1976.

RESPECTFULLY SUBMITTED,

By: DAVID C. SHAW
Juris No. 56493
525 Main Street
Hartford, Connecticut 06103
Tel: (203) 566-6360

Attorney for Plaintiff

By: JOAN E. PILVER
Juris No. 46650
525 Main Street
Hartford, Connecticut 06103
Tel: (203) 566-6360

Attorney for Plaintiff

(CERTIFICATION OF SERVICE OMITTED)

11.

United States District Court

District of Connecticut

Connecticut State Welfare Department	Manual Vol. 1
Social Service Policies — Public Assistance	Chapter III

NEED REQUIREMENTS AND THE ASSISTANCE PAYMENT

Available Cash Income — All Programs 332.3 - 332.31

332.3 Incentive Earnings — All Programs

Policy on Earned Income

To determine the amount of available earned income there is:

1. Disregard of specified amounts of earnings
2. Consideration of expenses of employment

Earned Income

Earned income is gross income earned through the receipt of wages, salary, commission or profit from activities in which the individual is either a self-employed individual or an employee.

Earned income received from self-employment means the total profit from business enterprise, farming, etc., resulting after the total cost of business expenses or cost of production of the income is deducted from the gross income. Personal expenses such as income tax payments, social security deductions, lunches, transportation, etc., are not classified as business expenses.

Disregard if earned income is for the period during which it is earned rather than when it is paid in cases of lump sum payments for services rendered over a period of more than one month.

332.31 **Expenses of Employment**

After the application of the appropriate disregard of incentive earnings, the following expenses incident to employment are to be deducted from the balance of the earnings:

1. *Non-personal work expenses* including union dues (if mandatory), cost of tools, materials, uniforms or other *special* clothing necessary for the job, *when they are not paid for or furnished by the employer*. Transportation to call on customers when not reimbursed by the employer.

2. *Personal work expenses* such as proper withholding tax based upon the maximum number of deductions to which applicant or recipient is entitled, social security tax, group life insurance and Blue Cross or other health insurance, if paid, as well as lunches and transportation.
    a. *Daily lunch allowance*
        (1) .50 cents per working day
    b. *Transportation allowance* - to work and return
        (1) cost per work day by public conveyance, or
        (2) cost of .06 per mile in recipient-owned car, or
        (3) cost of .06 per mile in car pool

If after the application of the disregard, the amount remaining is less than the actual employment expense, the difference between the two is not met by the department.

Revised 9-11-73
Effective 9-15-73

12.

United States District Court

District of Connecticut

Connecticut State Welfare Department — Manual Vol. I
Social Service Policies — Public Assistance — Chapter III

NEED REQUIREMENTS AND THE ASSISTANCE PAYMENT

Available Cash Income — All Programs — 332.3 - 332.31

332.3 **Incentive Earnings — All Programs**

Policy on Earned Income

To determine the amount of available earned income there is:

1. Disregard of specified amounts of earnings
2. Consideration of expenses of employment

Earned Income

Earned income is gross income earned through the receipt of wages, salary, commission or profit from activities in which the individual is either a self-employed individual or an employee.

Earned income received from self-employment means the total profit from business enterprise, farming, etc., resulting after the total cost of business expenses or cost of production of the income is deducted from the gross income. Personal expenses such as income tax payments, social security deductions, lunches, transportation, etc., are not classified as business expenses.

Disregard if earned income is for the period during which it is earned rather than when it is paid in cases of lump sum payments for services rendered over a period of more than one month.

332.31 **Expenses of Employment**

After the application of the appropriate disregard of incentive earnings, any expenses reasonably attributable to the earning of such income are to be deducted from the balance of the earnings. The following are the most frequently encountered kinds of allowable expenses:

1. Non-personal work expenses including union dues (if mandatory), cost of tools, materials, uniforms or other *special* protective clothing necessary for the job, *when they are not paid for or furnished by the employer.* Transportation to call on customers when not reimbursed by the employer.

2. *Personal work expenses* such as proper withholding tax based upon the maximum number of deductions to which applicant or recipient is entitled, social security tax, group life insurance and Blue Cross or other health insurance, if paid, retirement plan, if mandatory, as well as lunches and transportation.

    a. *Daily lunch allowance*
        (1) .50 cents per working day

    b. *Transportation allowance* - to work and return
        (1) cost per work day by public conveyance, or
        (2) cost of .06 per mile in recipient-owned car, or
        (3) cost of .06 per mile in car pool

3. The following claimed expenses are to be referred to the Office of the Deputy Commissioner for consideration: expenses other than those listed under items 1 and 2 which are claimed as being reasonably attributable to the earning of income. The Department will consider such expenses and decide whether they are so attributable.

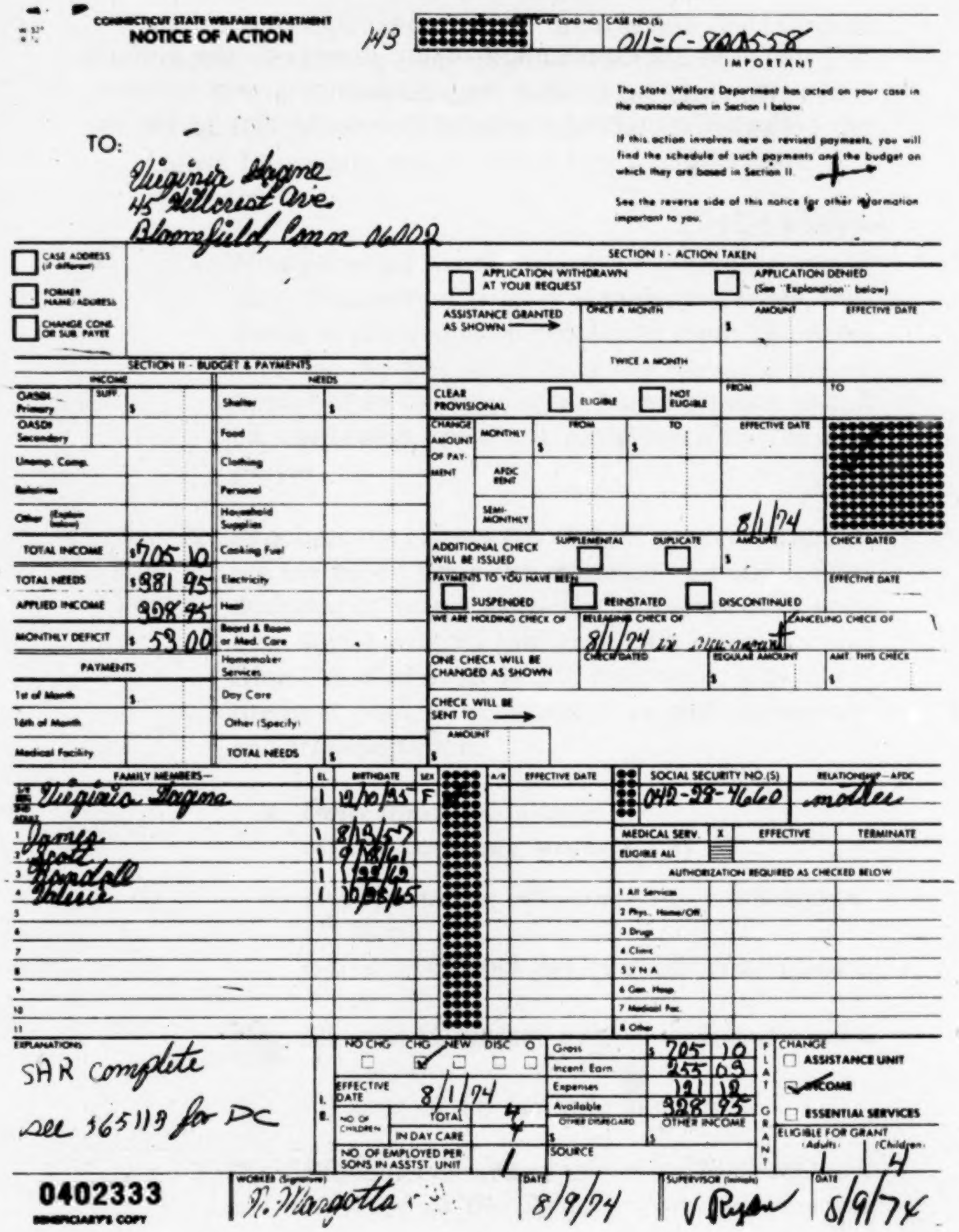
If after the application of the disregard, the amount remaining is less than the actual employment expense, the difference between the two is not met by the department.

Revised 5-29-75

13.

United States District Court

District of Connecticut



CONNECTICUT STATE WELFARE DEPARTMENT
NOTICE OF ACTION 143

CASE LOAD NO
CASE NO.(S) 011-C-800558

IMPORTANT

The State Welfare Department has acted on your case in the manner shown in Section I below.

If this action involves new or revised payments, you will find the schedule of such payments and the budget on which they are based in Section II.

See the reverse side of this notice for other information important to you.

TO:
Virginia Gagne
45 Hillcrest Ave
Bloomfield, Conn 06002

☐ CASE ADDRESS (if different)
☐ FORMER NAME/ADDRESS
☐ CHANGE CONS. OR SUB. PAYEE

SECTION I - ACTION TAKEN

☐ APPLICATION WITHDRAWN AT YOUR REQUEST
☐ APPLICATION DENIED (See "Explanation" below)

		AMOUNT	EFFECTIVE DATE
ASSISTANCE GRANTED AS SHOWN →	ONCE A MONTH	$	
	TWICE A MONTH		

CLEAR PROVISIONAL ☐ ELIGIBLE ☐ NOT ELIGIBLE FROM TO

CHANGE AMOUNT OF PAYMENT		FROM	TO	EFFECTIVE DATE
	MONTHLY	$	$	
	AFDC RENT			
	SEMI-MONTHLY			8/1/74

ADDITIONAL CHECK WILL BE ISSUED ☐ SUPPLEMENTAL ☐ DUPLICATE AMOUNT $ CHECK DATED

PAYMENTS TO YOU HAVE BEEN: ☐ SUSPENDED ☐ REINSTATED ☐ DISCONTINUED EFFECTIVE DATE

WE ARE HOLDING CHECK OF
RELEASING CHECK OF 8/1/74 in new amount
CANCELING CHECK OF

ONE CHECK WILL BE CHANGED AS SHOWN: CHECK DATED / REGULAR AMOUNT $ / AMT. THIS CHECK $

CHECK WILL BE SENT TO →
AMOUNT $

SECTION II - BUDGET & PAYMENTS

INCOME	SUFF.		NEEDS	
OASDI Primary		$	Shelter	$
OASDI Secondary			Food	
Unemp. Comp.			Clothing	
Relatives			Personal	
Other (Explain below)			Household Supplies	
TOTAL INCOME		$705.10	Cooking Fuel	
TOTAL NEEDS		$881.95	Electricity	
APPLIED INCOME		828.95	Heat	
MONTHLY DEFICIT		$53.00	Board & Room or Med. Care	
PAYMENTS			Homemaker Services	
1st of Month		$	Day Care	
16th of Month			Other (Specify)	
Medical Facility			TOTAL NEEDS	$

FAMILY MEMBERS—	EL.	BIRTHDATE	SEX	A/R	EFFECTIVE DATE	SOCIAL SECURITY NO.(S)	RELATIONSHIP—AFDC
1st/2nd ADULT Virginia Gagne	1	12/20/35	F			042-28-4660	mother
1 James	1	8/13/57					
2 Scott	1	9/18/61					
3 Randall	1	5/28/63					
4 Valerie	1	10/28/65					
5							
6							
7							
8							
9							
10							
11							

MEDICAL SERV.	X	EFFECTIVE	TERMINATE
ELIGIBLE ALL			
AUTHORIZATION REQUIRED AS CHECKED BELOW			
1 All Services			
2 Phys., Home/Off.			
3 Drugs			
4 Clinic			
5 V N A			
6 Gen. Hosp.			
7 Medical Fac.			
8 Other			

EXPLANATIONS
SAR complete
see 365119 for DC

I.E. ☐ NO CHG ☑ CHG ☐ NEW ☐ DISC ☐ O
EFFECTIVE DATE 8/1/74
NO. OF CHILDREN: TOTAL 4 IN DAY CARE 4
NO. OF EMPLOYED PERSONS IN ASSTST. UNIT 1

Gross	$705	10
Incent. Earn	255	09
Expenses	121	12
Available	328	95

OTHER DISREGARD $
OTHER INCOME $
SOURCE

FLAT GRANT
CHANGE
☐ ASSISTANCE UNIT
☑ INCOME
☐ ESSENTIAL SERVICES
ELIGIBLE FOR GRANT (Adults) 1 (Children) 4

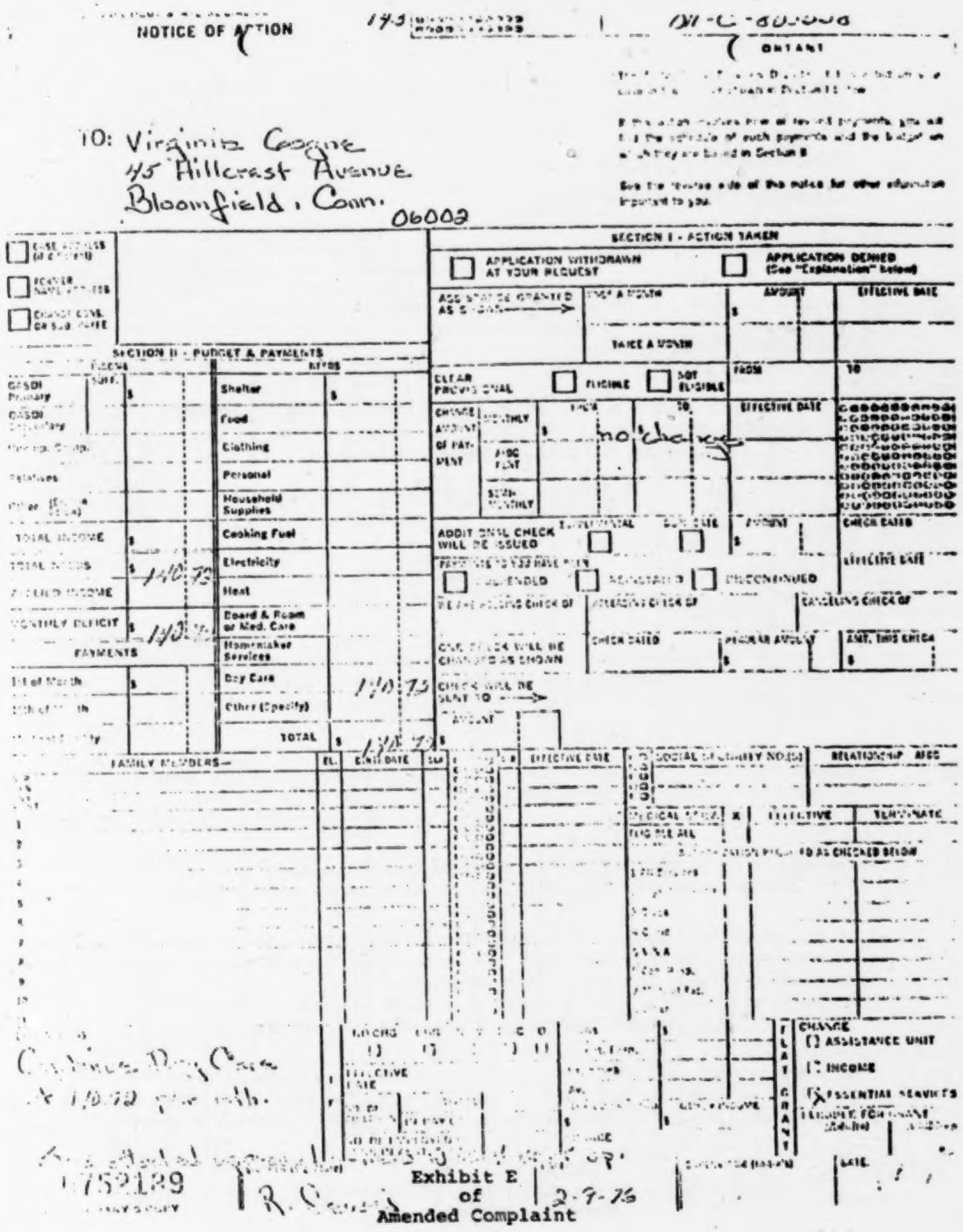
0402333
BENEFICIARY'S COPY

WORKER (Signature) R. Margotta DATE 8/9/74
SUPERVISOR (Initials) V Ryan DATE 8/9/74

14.

United States District Court

District of Connecticut



NOTICE OF ACTION 143
011-C-800558

See the reverse side of this notice for other information important to you.

TO: Virginia Gagne
45 Hillcrest Avenue
Bloomfield, Conn.
06002

SECTION I - ACTION TAKEN

☐ APPLICATION WITHDRAWN AT YOUR REQUEST
☐ APPLICATION DENIED (See "Explanation" below)

CLEAR PROVISIONAL ☐ ELIGIBLE ☐ NOT ELIGIBLE

CHANGE AMOUNT OF PAYMENT: MONTHLY $ no change

ADDITIONAL CHECK WILL BE ISSUED ☐ ☐

☐ SUSPENDED ☐ REINSTATED ☐ DISCONTINUED

SECTION II - BUDGET & PAYMENTS

INCOME		NEEDS	
OASDI Primary	$	Shelter	$
OASDI Secondary		Food	
Unemp. Comp.		Clothing	
Relatives		Personal	
Other		Household Supplies	
TOTAL INCOME	$	Cooking Fuel	
TOTAL NEEDS	$140.73	Electricity	
APPLIED INCOME		Heat	
MONTHLY DEFICIT	$140.73	Board & Room or Med. Care	
PAYMENTS		Homemaker Services	
1st of Month	$	Day Care	140.73
16th of Month		Other (Specify)	
		TOTAL	$140.73

Continue Day Care
at 140.73 per mth.

CHANGE
☐ ASSISTANCE UNIT
☐ INCOME
☒ ESSENTIAL SERVICES

0752129

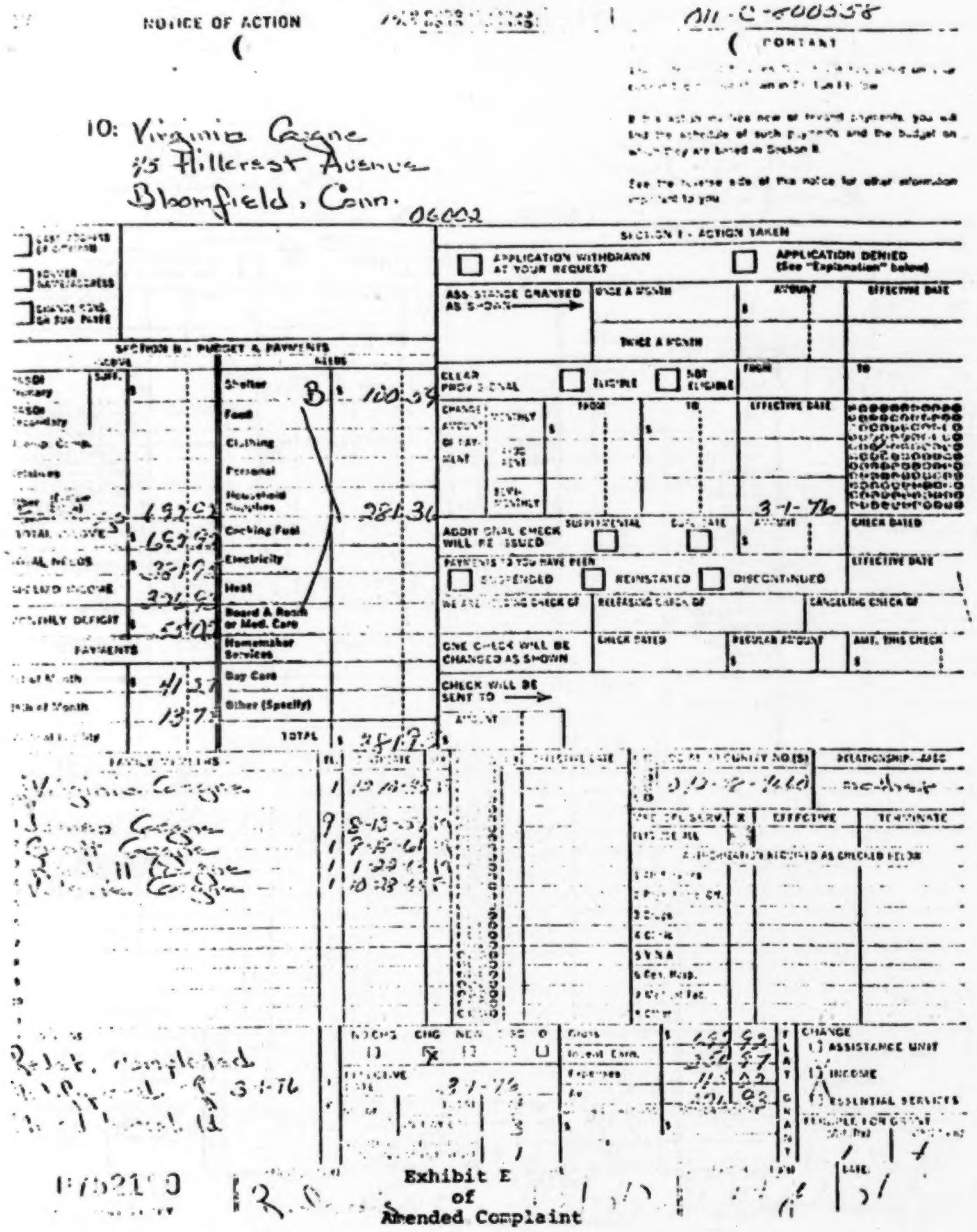
R. C[illegible] 2-9-76

Exhibit E
of
Amended Complaint

15.

United States District Court

District of Connecticut



NOTICE OF ACTION

A11-C-600558

CONTACT

If this action involves new or revised payments, you will find the schedule of such payments and the budget on which they are based in Section II.

See the reverse side of this notice for other information important to you.

TO: Virginia Cagne
75 Hillcrest Avenue
Bloomfield, Conn.
06002

SECTION I - ACTION TAKEN

☐ APPLICATION WITHDRAWN AT YOUR REQUEST

☐ APPLICATION DENIED (See "Explanation" below)

ASSISTANCE GRANTED AS SHOWN

ONCE A MONTH

TWICE A MONTH

AMOUNT

EFFECTIVE DATE

☐ ELIGIBLE ☐ NOT ELIGIBLE

EFFECTIVE DATE 3-1-76

ADDITIONAL CHECK WILL BE ISSUED ☐ SUPPLEMENTAL ☐ DUPLICATE

PAYMENTS TO YOU HAVE BEEN ☐ SUSPENDED ☐ REINSTATED ☐ DISCONTINUED

RELEASING CHECK OF

CANCELING CHECK OF

ONE CHECK WILL BE CHANGED AS SHOWN

CHECK DATED

REGULAR AMOUNT

AMT. THIS CHECK

CHECK WILL BE SENT TO

SECTION II - BUDGET & PAYMENTS

Shelter B $ 100.59

Food

Clothing

Personal

Household Supplies 281.36

Cooking Fuel

Electricity

Heat

Board & Room or Med. Care

Homemaker Services

Day Care

Other (Specify)

TOTAL $ 281.73

TOTAL ABOVE $ 659.93

MONTHLY DEFICIT $ 55.05

PAYMENTS

41.37

13.7

Virginia Cagne

RELATIONSHIP mother

EFFECTIVE

TERMINATE

SVNA

CHANGE

[ ] ASSISTANCE UNIT

[✓] INCOME

[ ] ESSENTIAL SERVICES

EFFECTIVE 3-1-76

Redet. completed 3-1-76

Exhibit E
of
Amended Complaint

16.

United States District Court

District of Connecticut

NOTICE

A medical services Identification Card accompanies each regular award check that you receive. You must show your latest Identification Card to your doctor, druggist or other vendor whenever you require medical services or supplies.

If you are receiving assistance, you are responsible for notifying your worker immediately of any change in your situation, including living arrangements, household members, income and assets.

If your application was denied because you were found ineligible for assistance, you are free to re-apply if your circumstances change.

If you are dissatisfied with the action taken, you may contact your worker for a review of your case. You also have the right to appeal and request a Fair Hearing within 30 days from the date of this notice. A request for a Fair Hearing must be made in writing, and addressed to the State Welfare Department, State Office Building, Hartford, Connecticut.

If you believe that you have been treated unfairly because of race, color, or national origin you have the right to appeal to the Commissioner of Welfare, the Commission on Civil Rights, or the U. S. Department of Health, Education and Welfare.

If you have further questions feel free to contact your worker.

AVISO

Cada cheque regular que usted recibe está acompañado por una Tarjeta de Identificación para los servicios médicos. Tiene que mostrarle su última Tarjeta de Identificación a su doctor, farmacéutico, u otro vendedor cuando usted necesite los servicios médicos u otras provisiones.

Si usted está recibiendo ayuda, usted es responsable de notificarle inmediatamente a su trabajador cua quier cambio en su situación, incluyendo los arreglos de vivienda, los miembros del hogar, ingresos y capital.

Si su solicitud le ha sido denegada porque se encontró que usted no era elegible para la ayuda, usted tiene el derecho de volver a solicitar si sus circunstancias cambian.

Si usted está desatisfecho con la acción tomada, usted puede comunicarse con su trabajador para la revisión de su caso. Usted tiene también el derecho de apelar y solicitar una Audiencia Imparcial dentro de los 30 días a partir con la fecha de este aviso. La petición para la Audiencia Imparcial se tiene que hacer por escrito y dirigirla a "State Welfare Department, State Office Building, Hartford, Connecticut".

Si usted cree que ha sido tratado injustamente debido a raza, color, u origen de nacionalidad usted tiene el derecho de apelar al Comisionado de Bienestar Público, la Comisión de Derechos Cíviles, o al Departamento de Salud, Educación y Bienestar de los E. U.

Si tiene información adicional siéntase libre en comunicarse con su trabajador.

17.

United States District Court

District of Connecticut

VIRGINIA GAGNE, ET AL.
PLAINTIFF,

vs.

CIVIL No. H-75-1
OCTOBER 15, 1976

EDWARD MAHER, ET AL.,
DEFENDANT

ANSWER TO AMENDED COMPLAINT

I.

1. Paragraphs 25, 27, 38, and 39 of the plaintiff's amended complaint are admitted.

2. Paragraphs 1, 2, 3, 5, 8, 31, 32, 33, 34, 37, 40, 43, 44, 45, and 46 set forth conclusions of law and not allegations of fact and therefore no answer is necessary; but, insofar as an answer may be required, the defendant denies each and every allegation of fact and conclusion of law that may be contained therein.

3. Paragraphs 4, 7, 19, 20, 22, 23, 26, 30, 35, 36, 41, and 42 are denied.

4. Defendant is without sufficient information and knowledge with which to determine the truth of the allegations contained in paragraphs 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 24, 28, and 29.

5. All allegations not expressly hereinbefore admitted, denied or modified are denied.

II.

Defendant Respectfully submits the following by way of affirmative defense.

1. The complaint fails to state a claim upon which relief may be granted.

2. This Court lacks jurisdiction over the subject matter of this complaint.

THE DEFENDANT

BY ITS ATTORNEY
CARL R. AJELLO
Attorney General

By: EDMUND C. WALSH
Assistant Attorney General

90 Brainard Road
Hartford, Connecticut 06114
Tel.: 566-7014

18.

United States District Court

District of Connecticut

VIRGINIA GAGNE, individually,
and on behalf of all others
similarly situated,
PLAINTIFF

vs. CIVIL NO. H75-1

EDWARD MAHER, ET AL.
DEFENDANTS.

CONSENT DECREE

It is hereby ordered this 2nd day of March 1977, that:

1. Judgment may enter in accordance with the provisions of this agreement. Nothing in this Consent Decree is intended to constitute an admission of fault by either party to this action.

2. In determining the availability of income and resources for working AFDC recipients, the defendants agree that they shall take into consideration any expenses reasonably attributable to the earning of income.

3. The defendants agree to publish the heretofore unpublished current day care expense standards. Any other unpublished standard allowance or allowances used by the Department for work-related expenses shall be based upon an evaluation of current prices available in the locality in which the recipient requesting the allowance resides.

4. The defendants agree that any standard allowance or allowances established by the Department, whether published or unpublished, for specific items of expense which are reasonably attributable to the earning of income, are not maximum amounts allowed. Working AFDC recipients will be allowed to prove that they incur expenses which are reasonably attributable to the earning of income which are in excess of, or different from, the Department's standard allowance, and upon presentation of such proof to the Department, such actually incurred expense will be allowed.

5. The defendants agree that all standard allowances established by the Department for expenses which are reasonably attributable to the earning of income, by AFDC recipients shall be reviewed annually to determine the currency of their relationship to the cost of living. In the annual report, required by §17-2 of the Connecticut General Statutes, in which the Commissioner of Social Services is required to at least annually compute a redetermination and such revisions to all components of the standards of need for the several programs administered by the Department so as to reflect changes in living costs using the current federal Regional Consumer Price Index, a current computation for all work-related expense standards will be separately included. Where such standards are found to be not reasonably priced, the Commissioner shall so inform the appropriate committee of the General Assembly.

6. The class of persons the plaintiff is seeking to represent shall be certified to include all AFDC recipients in the State of Connecticut who have or claim to have expenses which are reasonably attributable to the earning of income.

7. The defendant agrees that the work-related transportation allowance specified at Connecticut Department of Social Services Policy Manual, Volume I, Chapter III at Index 332.31, 2b(2) and (3) shall be increased, from $.06 per mile to $.12 per mile.

8. The defendant shall automatically increase the aforesaid transportation allowance for all working AFDC recipients who incur the work-related transportation expense listed in said Policy Manual in Index 332.31, 2b(2) and (3), effective March 1, 1977. It shall be implemented as follows:

(a) For all new applicants, after March 1, 1977, the $.12 per mile allowance will be granted immediately.

(b) For currently employed AFDC recipients who are now receiving the $.06 per mile allowance, the increased allowance will be implemented at the time of such recipient's next scheduled or unscheduled case review whichever occurs first, but in no event later than June 1, 1977. A retroactive adjustment to March 1, 1977, will be made for such a recipient by issuing to him or her a separate check in the amount of $.06 a mile or such other greater amount per mile as the recipient was found to be entitled for each mile of travel, from March 1, 1977, to the date of such case review.

9. The Department of Social Services shall mail the Notice attached to this stipulation as exhibit "A" to all AFDC recipients no later than April 1, 1977, and this form will also be mailed to each recipient who is working or is planning to become employed before any and all scheduled face-to-face interviews.

10. At each face-to-face interview, the interviewing worker shall clearly advise each working welfare recipient, that, in determining the availability of income and resources, for purposes of computing the recipient's award, income equal to expenses reasonably attributable to the earning of income will *not* be included as income to such recipient and will be

disregarded by the Department. The interviewing worker will further explain that, although the Department of Social Services has adopted certain standard allowances, recipients may claim expenses greater than or different from those standards if it can be demonstrated that such expenses are reasonably attributable to the earning of income.

11. After each face-to-face interview, the notice attached hereto as exhibit "B" shall be completed and mailed to the recipient. This notice shall be in addition to and not in lieu of any other notice heretofore required by law.

12. If the working AFDC recipient disagrees with the kind and/or amount of work-related expense allowances allowed, or the computation thereof, he or she may request a fair hearing to challenge the Department's decision. Any decision that would result in the suspension, reduction or discontinuance of public assistance shall be stayed if any evidentiary hearing is requested in writing by the recipient and returned to the Department within ten days of the date of notice.

13. The Department shall modify its regulations and policy to the extent necessary to make them consistent with this stipulation.

14. All notices required by this stipulation shall be printed in both English and Spanish.

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06103
Tel. (203) 566-6360

DEFENDANT, EDWARD W. MAHER
Commissioner of Social Services
State of Connecticut

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Tel. (203) 566-7014

SO ORDERED:

T. EMMET CLARIE, CHIEF
United States District Judge

EXHIBIT "A"

NOTICE TO ALL EMPLOYED AND SOON TO BE EMPLOYED AFDC RECIPIENTS:

Federal law requires that, before the Department of Social Services determines the amount of your welfare award check, it must first allow you to keep the first $30.00 of your gross earned income plus one-third (⅓) of the remainder and then to deduct from your earned income all of your work-related expenses which are reasonably related to the earning of such income.

Expenses such as those incurred for transportation to and from work, or any other work-related expenses which are reasonably related to the earning of your income may be claimed, together with all mandatory payroll deductions. (The cost of providing the necessary care for your child or children while you are at work will be paid by separate check.)

If you have such expenses and believe they have not been fully or properly considered by the Department in determining the amount of your present award, please contact your District Office of the Department of Social Services.

You must be prepared to prove such expenses by producing receipts, sales slips or other evidence of your claims.

EXHIBIT "B"

SUMMARY OF EARNINGS AND WORK-RELATED EXPENSES

Your AFDC award has been (increased) (decreased) (left unchanged) from ______________ to ______________
effective ______________
because ______________________________
Below is the computation of your expenses reasonably attributable to earning of income. These expenses have been exempted in determining your AFDC award. Your gross monthly income was based on the average weekly earnings of the weeks in which you worked during the past 13 weeks. If you have just started work, your gross income will be projected on your anticipated earnings.

We subtracted from your gross income:

(a) Work Incentive Given You By Law __________/mo.
(b) Income Tax Deduction __________/mo.
(c) FICA Deduction __________/mo.
(d) Other Mandatory Deductions
____
______________________ __________/mo.

(e) Work-related Expenses

(i) Public Transportation __________/mo.

(ii) Private Transportation Allowance
_____ miles at _____ per mile. __________/mo.

(iii) Lunch Allowances __________/mo.

(iv) Mandatory Uniform Allowance __________/mo.

(v) Required Protective
Work Clothing __________/mo.

(vi) Other Expenses

____

____

________________________ __________/mo.

Total Work Expenses __________/mo.

Your total work expenses of ____________ have been exempted from your gross income of ____________ to determine the amount of your income that will be applied toward your AFDC award.

Day Care allowance, if any, will be issued in a separate check on a monthly basis at the rate of __________/mo.

Exception — When children are in certain Day Care Centers, payments will be made as charged directly to the Day Care Center.

IF YOU DISAGREE WITH THE KIND AND/OR AMOUNT OF WORK EXPENSES, DAY CARE ALLOWANCE OR INCOME FIGURES SHOWN ABOVE, YOU MAY REQUEST AN EVIDENTIARY AND/OR A FAIR HEARING. (SEE ATTACHED FORM.)

Recipient: ______________ Worker: ______________

Case Number: __________ Date Mailed: __________

19.

United States District Court

District of Connecticut

VIRGINIA GAGNE, Individually
and on behalf of all others
similarly situated

vs. Civil No. H-75-1

EDWARD MAHER, COMMISSIONER OF
SOCIAL SERVICES, et al

RULING ON MOTION FOR ATTORNEYS' FEES

The plaintiff, having entered into a stipulated judgment with the defendant Commissioner of the Connecticut Department of Social Services, now seeks an award of attorneys' fees under the provisions of 42 U.S.C. § 1988. The defendant opposes such an award on the following grounds: (1) that the Eleventh Amendment bars an award of attorneys' fees which will be paid out of the State treasury; (2) that the plaintiff is not entitled to an attorney's fee, since the case was terminated by consent decree rather than by a formal order of court; and (3) that 42 U.S.C. § 1988 does not permit an award of attorneys' fees where the defect in the state law is an inconsistency with a federal *statute*, rather than with the federal *Constitution*. The Court rejects each of these arguments, and holds that the plaintiffs' attorneys are entitled to a fee award.

The Court finds $45 to be a reasonable hourly rate. This rate, applied to the total of 95⅝ allowable hours worked by the plaintiff's attorneys, would yield a total fee of $4,303.13. However, the Court has decided to reduce this figure by 30%, in recognition of the fact that 30% of the budget of the plaintiff's attorneys' legal aid office is federal money distributed by the Connecticut Department of Social Services. Consequently, the Court finds to be fair and reasonable a total attorney's fee of $3,012.19.

Factual Background

The plaintiff Virginia Gagne instituted this § 1983 class action with a complaint filed on January 3, 1975, wherein she alleged that the Connecticut Department of Social Services (hereinafter "the defendant") was calculating welfare benefits for working AFDC recipients in a manner which was contrary to federal statutory and constitutional law. Specifically, the complaint alleged: (1) that contrary to 42 U.S.C. § 602(a)(7) and 45 C.F.R. § 233.20(a)(iv)(3), was including certain work-related expenses when it calculated the amount of money available to a welfare recipient; (2) that the defendant denied procedural due process to working AFDC recipients by failing to adopt procedures reasonably calculated to inform them as to whether their claims for work-related expenses were being denied or granted and by failing to inform them of their right to challenge adverse determinations in an evidentiary hearing; and (3) that the defendant's maintenance of standard work expense allowances were so arbitrary and unreasonable as to deprive working AFDC recipients of substantive due process.

After discovery and negotiations the parties entered into a consent decree, which was approved by the Court on March 2, 1977. The consent decree gave the plaintiff, as well as the class she represented, virtually all the relief sought in the complaint. Under the terms of the consent decree the defendant agreed to: permit working AFDC recipients to prove that they incur work-related expenses which are in excess of the standard allowance established by the defendant; conduct an annual review for the purpose of updating the standard allowances; publish heretofore unpublished standard allowances; double the standard transportation allowance from $.06 to $.12 per mile; provide written notice to working AFDC recipients of the precise amount of work-related expenses which are to be allowed as to each recipient; provide written notice of the AFDC recipients' right to an evidentiary hearing in the event that the recipient disagrees with the defendant's calculation of work-related expenses; and stay any reduction in AFDC benefits if the recipient requests an evidentiary hearing within ten days of receiving the aforesaid written notice.

Discussion of the Law

The Civil Rights Attorney's Fees Awards Act of 1976[1] is applicable to cases, such as the present one, which were pending on the effective date of the Act. *Beazer v. New York City Transit Authority*, 558 F.2d 97, 100 (2d Cir. 1977). The defendant argues that the Eleventh Amendment bars any award of an attorney's fee, which will be paid out of the State treasury. This argument is foreclosed by the recent holding of the Supreme Court that the Civil Rights Attorney's Fees Awards Act of 1976 may be utilized to obtain an attorney's fee award against a State, notwithstanding the strictures of the Eleventh Amendment. *Hutto v. Finney*, ________ U.S. ________, Docket No. 76-1660 at pp. 13-18 (June 23, 1978). The rationale of that case was that the attorney's fee award has only an "ancillary" effect on the State treasury, and therefore the award does not offend the Eleventh Amendment. Moreover, Congress may abrogate the States' Elevent Amendment immunity when it is acting pursuant to § 5 of the Fourteenth Amendment, *see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and it is clear from the legislative history that the Civil Rights Attorney's Fees Awards Act of

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[1] That statute, which has been codified in 42 U.S.C. § 1988, reads:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
>
> As amended Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641."

1976 was enacted pursuant to § 5 of the Fourteenth Amendment. *See* S. Rep. No. 94,1011, p.5 (1976); H.R. Rep. No. 94-1558, p.7 (1976). Thus the Eleventh Amendment does not bar the award of an attorney's fee against the defendant in this case.

The defendant contends that the plaintiff is not a "prevailing party" who is entitled to an attorney's fee under the terms of the Act, since the case was terminated by a consent decree rather than by an order of court. The legislative history of the Act is very explicit on this point. "Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. 94-1011, p.5 (1976). The same Senate report cites with approval *Kopet v. Esquire Realty Co.*, 523 F.2d 1005, 1008 (2d Cir. 1975), where the court held that "federal courts may award counsel fees based on benefits resulting from litigation efforts even where adjudication on the merits is never reached, e.g., after a settlement."

The defendant urges that awarding an attorney's fee in this case would frustrate attempts to settle cases, in that defendants would litigate in order to avoid paying an attorney's fee. This argument cuts with at least equal force in the other direction, however, because plaintiffs who thought they would be deprived of an attorney's fee unless a case was adjudicated on the merits would likewise be reluctant to settle, even in instances where the defendant offered them full relief in the consent decree. Other courts, agreeing with this analysis, have held that the 1976 amendment to 42 U.S.C. § 1988 permits the award of an attorney's fee in spite of the fact that the case is disposed of without final adjudication on the merits. *See Brown v. Culpepper*, 559 F.2d 274, 276-277 (5th Cir. 1977); *Howard v. Phelps*, 443 F.Supp. 374, 376-377 (E.D. La. 1978); *Buckton v. National Collegiate Athletic Association*, 436 F. Supp. 1258, 1264-1265 (D. Mass. 1977).

The fact that the plaintiff in this case did not receive all the relief originally requested in her complaint also does not preclude recovery of an attorney's fee. The Senate report on the bill notes that an attorney's fee award is "appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all the issues." S. Rep. No. 94-1011, p.5 (1976). As noted previously the plaintiff in this case received, through the consent decree, substantially all of the relief originally sought in her complaint; thus she is entitled to an attorney's fee even though she did not prevail in every particular.

The defendant further argues that the Civil Rights Attorney's Fees Awards Act of 1976 does not permit an attorney's fee award in this case, because the defect in the state law is an inconsistency with a federal *statute*, rather than with the federal *Constitution*. It is true that there is no federal court jurisdiction, under 42 U.S.C. § 1343(3) or § 1343(4), to entertain a § 1983 claim which is based only on statutory, rather than constitutional, grounds. *Andrews v. Maher*, 525 F.2d 113, 118-120 (2d Cir. 1975). However, where the § 1983 complaint states both statutory and constitutional claims, 42 U.S.C. § 1343(3) confers jurisdiction on the federal court to hear the constitutional claim. Then, so long as the constitutional claim is of sufficient substance to support federal jurisdiction, the federal court may decide the statutory claim as a matter of pendent jurisdiction and avoid ultimate decision on the constitutional claim. *Hagans v. Lavine*, 415 U.S. 528, 536 (1974). Under the *Hagans* doctrine, this Court would have had jurisdiction over the case, and could have decided the statutory claim without reaching the constitutional issue, as long as the Court first found that the constitutional issue was not "obviously frivolous," "wholly insubstantial," or "so attenuated and unsubstantial as to be absolutely devoid of merit." *Id.* at 536-537.

If the instant case were now before the Court on a motion to dismiss, the Court would rule as a matter of law that there is federal jurisdiction. The complaint raises several constitutional issues which are "substantial" within the meaning of *Hagans v. Lavine*, to wit: whether an impermissible distinction had been created between those working welfare recipients whose work-related expenses were fully considered in the computation of AFDC awards and those whose work-related expenses were not fully considered, in violation of the equal protection clause; whether the defendant, by creating a table of standard allowances, which could not be challenged in individual cases, set up an irrebuttable presumption with respect to work-related expenses, in violation of the due process clause; and whether the failure to provide written notice of the opportunity for an evidentiary hearing, if the welfare recipient disputed the defendant's calculation of work-related expenses, violated the due process clause.

Since there would be federal jurisdiction to hear this case, the fact that the Court, if it had been called upon to rule on the merits of the case, would have decided it on statutory grounds, is no reason to deny the plaintiff an attorney's fee. As was said where an attorney's fee was awarded pursuant to 42 U.S.C. § 1988 in a case similar to the one at bar:

> "[I]t seems manifestly unfair to penalize plaintiffs who couple their constitutional claims with meritorious statutory claims and thereby facilitate the federal policy of avoiding unnecessary constitutional decisions. To deny such plaintiffs the attorneys' fees to which they might otherwise be entitled frustrates rather than promotes the policy of the Act." *Southeast Legal Defense Group v. Adams*, 436 F.Supp. 891, 895 (D. Oregon 1977).

Having determined that the plaintiff is entitled to an attorney's fee, the Court must determine how much the award should be. This Court has recently held that the most important factors to be considered in calculating an award for attorneys' fees are the time and labor expended, counsels' experience and reputation, the magnitude and complexity of the litigation, the amount recovered, the attorneys' "risks of litigation," and awards in similar cases. *Fitzpatrick v. Bitzer*, Civil No. 15,492 (July 12, 1978). The plaintiff was represented in this case by the Legal Aid Society of Hartford County, Inc., and she was not required to pay for the services rendered. Affidavits submitted by the plaintiff's two attorneys, Joan E. Pilver and David C. Shaw, indicate that at the time the suit was instituted they each had a little more than two years' experience at the Bar. Shaw spent a total of 149½ hours on the case, while Pilver spent 99¾ hours. Affidavits submitted by two other Hartford attorneys disclose that the customary fee in the Hartford area for lawyers with three years of experience is $45 per hour. Considering all the factors in this case, including the fact that there was never an evidentiary trial and that the aggregate in-court time for both attorneys was 5½ hours, the Court finds the hourly rate of $45 to be fair and reasonable.

Before applying this rate to the number of hours claimed by Pilver and Shaw, it is necessary to subtract the number of hours which were devoted to seeking an award of attorneys' fees, because those hours were spent solely for the attorneys' benefit and did not benefit the plaintiffs. *See City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1102 (2d Cir. 1977); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 111 (3d Cir. 1976). While those cases arose in contexts other than an award under 42 U.S.C. § 1988, at least one other court has held that the same reasoning applies in applications for attorneys' fees under the civil rights statutes. *Commonwealth of Pennsylvania v. O'Neill*, 431 F.Supp. 700, 705 (E.D. Pa. 1977). Pilver spent 15½ hours working on the attorneys' fee application and Shaw spent 42½ hours. Substracting these hours from the total claimed by the attorneys leaves 84¼ hours for Pilver and 107½ hours for Shaw, for a total of 191¼ hours.

The Court has decided to disallow one half of the hours worked, for the reason that the issues involved in the case were relatively simple and most attorneys would not have spent so many hours on the case. The plaintiffs' attorneys themselves concede that the case was not a complex one.

> "The law is unmistakenly [*sic*] clear. The Supreme Court in *Shea v. Vialpando*, [416 U.S. 251 (1974)] held that the incentive earnings provisions of the Social Security Act required state agencies to disregard a working welfare recipient's earned income equivalent to all his or her reasonable work related expenses." (footnote omitted). Brief in Support of Plaintiff's Motion for Attorney's Fees at 10.

Computing the 95⅛ allowable hours at $45 per hour would yield a total of $4,303.13. By way of comparison, this Court recently awarded $6,275 for services at the District Court level in a case where the legal theory advanced by the plaintiff was a novel one and the plaintiff's attorney had a great deal more experience than the present attorneys. *Fitzpatrick v. Bitzer*, Civil No. 15,942 (July 12, 1978).

This $4,303.13 figure must be further reduced by 30%, which is the percentage of the budget of the plaintiff's attorneys that is distributed, out of Title XX funds, by the defendant. Title XX of the Social Security Act, 42 U.S.C. § 1937 *et seq.*, is a program wherein federal money is distributed by state agencies for programs designed to benefit the economically disadvantaged. The Department of Social Services, which is the single agency designated by the Governor of Connecticut to administer the State's Title XX program, has considerable discretion in determining how funds will be allocated. An affidavit filed by the Executive Director of the Legal Aid Society of Hartford County, Inc., discloses that the Legal Aid Society had a budget of $131,379 in 1975, $203,771 in 1976, and $233, 493 in 1977. During those same years the Legal Aid Society received Title XX funding in the amounts of $37,157, $32,390, and $100,498. Thus, during the years in which this lawsuit was

pending, the Legal Aid Society received approximately 30% of its funding from Title XX.

An award of attorneys' fees is not precluded either by the fact that the plaintiff was not required to pay her counsel, *Jordan v. Fusari*, 496 F.2d 646, 649 (2d Cir. 1974), or by the fact that the plaintiff's attorneys are publicly-funded. *Torres v. Sachs*, 538 F.2d 10, 11-12 (2d Cir. 1976). Nonetheless, "it is appropriate for the district court . . . to consider the factor of federal funding in its computation of a discretionary attorney's fee award." *EEOC v. Enterprise Ass'n Steamfitters*, 542 F.2d 579, 593 n. 13 (2d Cir. 1976), *cert. den.* 430 U.S. 911 (1977). This factor is particularly relevant in this case, in that not only did the plaintiff's attorneys receive federal funding but that funding was distributed by the very defendant from whom the plaintiff now seeks to collect an attorney's fee.

This Court, in exercising its discretion, is of the opinion that the award should be reduced to reflect the public contribution of federal funds to the plaintiff's attorneys. The purpose of the Civil Rights Attorney's Fees Awards Act of 1976 is to encourage the institution of meritorious lawsuits which, due to economic considerations, would not be brought if an attorney's fee could not be assessed against the defendant. In the instant case the defendant has already done its part to encourage such lawsuits by distributing federal money to the Legal Aid Society of Hartford County, Inc. Failing to take this factor into account when awarding an attorney's fee would be to force the defendant to pay twice for the same legal services. Therefore, the initial figure of $4,303.13 will be reduced by 30%.

Accordingly, the total award for attorneys' fees in this case shall be $3,012.19. SO ORDERED.

Dated at Hartford, Connecticut, this 1st day of August, 1978.

T. EMMET CLARIE
Chief Judge

20.

Supreme Court of the United States

No. 78-1888

EDWARD W. MAHER, ETC.,

Petitioner,

v.

VIRGINIA GAGNE, ETC.

ORDER ALLOWING CERTIORARI. Filed October 1, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

21.

Supreme Court of the United States

No. 78-1888

EDWARD W. MAHER, ETC.,

Petitioner,

v.

VIRGINIA GAGNE, ETC.

ON CONSIDERATION of the motion of the respondent for leave to proceed herein *in forma pauperis,*

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

October 1, 1979

Supreme Court, U.S.
FILED
AUG 6 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978

No. 78-1888

EDWARD MAHER, PETITIONER

V.

VIRGINIA GAGNE

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Virginia Gagne, respectfully moves pursuant to Rule 53, paragraph 1 of the Rules of this Court, that she be allowed to proceed in forma pauperis. Her affidavit is attached to this motion.

Joan E Pilver

JOAN E. PILVER
DAVID C. SHAW
LEGAL AID SOCIETY OF
HARTFORD COUNTY, INC.
525 MAIN STREET
HARTFORD, CT 06103
TEL. (203) 566-6360
COUNSEL FOR RESPONDENT

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978

NO. 78-1888

EDWARD MAHER, PETITIONER

V.

VIRGINIA GAGNE

AFFIDAVIT

I, Virginia Gagne, being duly sworn, depose and say in support of my motion for leave to proceed without being required to pay costs or fees:

1. I am the respondent in the above entitled case.

2. Because of my poverty, I am unable to pay the costs of said cause, pay for printing or give security for the same. I am employed by the Bass Plating Co. and receive a weekly net salary of $189.00, plus an additional $45 monthly from State Welfare. Out of this sum, I must support three children, two of whom are retarded, and provide partial support for a fourth. I have no other income, assets or savings.

3. The nature of said cause is briefly stated as follows: The petitioner claims in his petition for certiorari that counsel in this case are not entitled to attorneys fees under the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. §1988 because the case was settled in the district court by consent decree. The petitioner argues that the appellate court erred in holding that the plaintiff was nevertheless a "prevailing party" within the meaning of the Act and thus entitled to fees.

Virginia Gagne
VIRGINIA GAGNE

Subscribed and sworn to before me this 11th day of July 1979.

NOTARY PUBLIC

RECEIVED
AUG - 6 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1888

EDWARD W. MAHER, COMMISSIONER OF
INCOME MAINTENANCE,
STATE OF CONNECTICUT,
Petitioner

v.

VIRGINIA GAGNE, INDIVIDUALLY AND
ON BEHALF OF OTHERS SIMILARLY SITUATED,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1888

EDWARD W. MAHER, COMMISSIONER OF
INCOME MAINTENANCE,
STATE OF CONNECTICUT,

Petitioner,

v.

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ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondent

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Virginia Gagne, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case, entered March 9, 1979. That opinion is reported at 594 F.2d 336.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Petitioner's First Question Presented Ignores The Clear Precedent of This Court and Is Inconsistent With Decisions of Every United States Court of Appeals That Has Considered the Issue.

Petitioner's argument that the principles of sovereign immunity embodied in the Eleventh Amendment to the United States Constitution, prohibit fee awards against state officials under the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988, (hereinafter, the Fees Act), in cases where the constitutional issues presented to the court were never formally resolved, either because judgement was entered on statutory grounds, or, as here, where the case was settled by consent decree, has been rejected by every court of appeals that has considered the issue. *See*, *Lund v. Affleck*, 587 F.2d 75, 76-77 (1st Cir. 1978); *Bond v. Stanton* 555 F.2d 172, 174-175 (7th Cir. 1977); *cert. denied*, 438 U.S. 916 (1978), *Seals v. Quarterly County Court* 562 F.2d 390, 393-394, (6th Cir. 1977), *Kimbrough v. Arkansas*

Activities Association 574 F.2d 423, 426-427 (8th Cir. 1978).[1]

The foundation of petitioner's contention is its allegation that Congress did not intend to abrogate the States' immunity in cases where a plaintiff prevails without a judicial determination that plaintiff has a meritorious constitutional claim, and alternatively, that if Congress did so intend, it exceeded its express authority under section 5 of the Fourteenth Amendment.

As regards petitioner's first claim, the legislative history of the Fees Act indicates that Congress was aware of and carefully evaluated competing considerations to reach its conclusion that fee awards should be made in cases terminated by consent decree, as well as in those cases that proceed to judgement on a "non-fee claim."

Contrary to petitioner's assertions (see petitioner's brief p. 6a), the legislative history is quite clear that Congress intended fee awards in cases such as this. The Senate Report[2] states that attorneys' fees should be awarded in a wide variety of cases, including those terminated by consent decree, citing, Kopet v. Esquire Realty Co. 523

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[1] Accord, Southeast Legal Defense Group v. Adams, 436 F. Supp. 891, 893-895, (D. Ore. 1977).

[2] S. Rep. No. 1011, 94th Cong. 2nd Sess. 5 (1976) U.S. Code Cong. & Admin. News at 5912-5913.

F.2d 1005 (2d Cir. 1975). In that case, and in Blau v. Rayette - Faberge, Inc. 389 F.2d 469 (2d Cir. 1968), the Court of Appeals for the Second Circuit held that counsel fees could be awarded whenever plaintiffs' efforts confer benefits on the class, including those obtained through settlement.

The House Report,[3] on a bill that was identical in every material respect to the Senate version of the Fees Act, directly addresses the situation in which a constitutional claim is joined with a non-fee statutory claim:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in [the Fees Act] with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. .... In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive .... In such cases, if the claim for which fees may be awarded meets the "substantiality" test, see Hagans v. Lavine, [415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974)]; United Mineworkers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact".

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[3] H.R. Rep. No. 1558, 94th Cong. 2nd Sess. 4 n. 7 (1976).

Congress was aware that fee awards in such circumstances further the congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding and deeply rooted judicial policies of avoiding unnecessary decisionmaking of important constitutional issues,[4] as well as encouraging the settlement of litigation.[5] Congress has reasonably accommodated the competing interests of the judicial and legislative branches of government, and its judgment should be accorded the well-deserved deference to which precedent indicates it is entitled.[6]

---

[4] Spector Motor Co. v. McLaughlin 323 U.S. 101, 105 (1944).

[5] The court below stated:

> The State's interpretation of legislative intent would encourage plaintiffs to try cases in which reasonable settlement offers have been received, merely to ensure a fee award. Cf. Parker v. Matthews 411 F. Supp. 1059, 1062 (D.D.C. 1976), aff'd sub. nom.,Parker v. Califano, 561 F.2d 320 (D. C. Cir. 1977); at 340 (citation omitted).

[6] This same legislative history persuaded the court below that:

> Given the legislative intent to authorize award of attorneys' fees to the prevailing party in settled cases and to avoid unnecessary decision of constitutional issues, we think it clear that Congress intended the test set forth in the House Report, to govern the award of attorneys' fees in suits that are settled as well as those that proceed to judgment on the "non-fee" claim.

594 F.2d at 340.

Petitioner alternatively contends, that even if Congress did intend to allow the awarding of fees in cases where the constitutional issues raised remained unresolved, it exceeded its power under §5 of the Fourteenth Amendment, in so acting. That argument, however, has already been substantially rejected by this Court. In Hutto v. Finney 437 U.S. 678, 693 (1978), this Court held that: "Congress has plenary power to set aside the states' immunity from retroactive relief in order to enforce the 14th amendment," and that, "When it passed the [Fees] Act, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the states," at 693-694. In Katzenbach v. Morgan, 384 U.S. 641 (1966), this Court, rejecting arguments identical to those being made by the petitioner here, quoted from Ex parte Comm. of Virginia, 100 U.S. 339, 345 (1879), in discussing the effect of section 5:

> 'It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.'

The Court then went on to dismiss what is the heart of petitioner's argument:

> A construction of §5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the amendment.

384 U.S. at 648-649.

It is clear after Katzenbach v. Morgan, supra, and Fitzpatrick v. Bitzer 427 U.S. 445, 453 -456 (1976), that any appropriate means of implementing the Fourteenth Amendment, overrides the State's Eleventh Amendment immunity, and that great deference should be accorded Congress' determination as to what measures are appropriate to that end. Katzenbach v. Morgan, supra at 653.

As the court found below, Congress's approval of the Hagans v. Lavine jurisdictional standard in determining whether an award of fees should be made, effectively balances the interests of Congress in promoting suits to further constitutional rights, with the concern of the judiciary regarding the unnecessary decision of constitutional questions, and is thus an appropriate means of implementing the Fourteenth Amendment.

Petitioner's arguments, neither novel nor unique, have now been considered and rejected by this Court and every court of appeals that has considered them. The petitioner's effort to have this clear precedent reversed should therefore be rejected.

2. The Court Below Correctly Held That An Award of Attorneys' Fees Against a State Offical Fits Within the "Ancillary Effect" Exception to Edelman v. Jordan and Is Thus Not Barred By the Eleventh Amendment.

(1) Consideration of the second Question Presented is unnecessary for resolution of the case.

As the court below found, and the discussion above supports, The Civil Rights Attorney's Fees Awards Act, 42 U.S.C.§ 1988, enacted by Congress pursuant to its power under section 5 of the Fourteenth Amendment, provides the necessary statutory authorization to abrogate the Eleventh Amendment and allow an award of fees against a state official. It would thus be unnecessary for this Court to consider petitioner's additional argument that the court of appeals erred in holding that the award of attorneys' fees in this instance, fits within the "ancillary effect" exception to Edelman v. Jordan, 415 U.S. 651, 667 (1974), and is thus not barred by the Eleventh Amendment.

In Fitzpatrick v. Bitzer, supra, this Court expressly refused to review that part of the holding of the court below which would have provided an alternate basis upon which to justify an award of attorneys' fees against a state defendant. The Court said,

> In No. 75-283, the state officials contest the Court of Appeals' conclusion that an award of attorneys' fees in this case would under Edelman have only an "ancillary effect" on the state treasury and could therefore be permitted as falling outside the Eleventh Amendment under the doctrine of Ex parte Young. We need not address this question, since, given the express

> congressional authority for such an award in a case brought under Title VII, it follows necessarily from our holding in No. 75-251 that the Congress' exercise of power in this respect is also not barred by the Eleventh Amendment.

427 U.S. at 456-457 (citations omitted)

Similarly, here, it would be a departure from customary judicial procedure and precedent for this Court to decide the issue presented by the petitioner, unnecessary as it is, to the resolution of the case.

(2) The decision of the court of appeals below was correct.

Even if this Court were to break with precedent and consider reviewing the question of whether an award of attorneys' fees fit within the "ancillary effect" exception to Edelman, it is clear that the Court would conclude that the appeals court below was correct in its ruling that an award of attorneys' fees does, in fact, fit within that exception.

In Edelman, although this Court held that the Eleventh Amendment gave the States immunity from retroactive monetary relief, it reasserted the rule declared in Ex parte Young, 209 U.S. 123 (1908), that state officers are nevertheless not immune from prospective injunctive relief. Further, notwithstanding the Eleventh Amendment, States may be obligated to comply with costly federal orders if the costs are only "ancillary" to such a prospective order; "ancillary" being defined in Edelman as "a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra." at 667.

With particular regard to attorneys' fees, while this Court has not decided the issue squarely, its previous decisions would be consistent with a holding that attorneys' fees fit within the "ancillary effect" exception to Edelman. In Sims v. Amos 340 F. Supp. 691 (M.D. Ala.), aff'd 409 U.S. 942 (1972), the Supreme Court summarily affirmed a decision of the district court awarding attorneys' fees on the basis that "the state has no power to impart to its officers any immunity from such injunction or from its consequences, including the court costs incident thereto." 340 F. Supp. at 694 n.8. Although the later case of Alyeska Pipeline Service Co. v. Wilderness Society 421 U.S. 240, 269, n. 44 (1975) may have undercut the value of this case somewhat, respondent would argue that it still retains precedential value.[7]

In the recent case of Hutto v. Finney, supra, this Court upheld an award of attorneys' fees against a state defendant who had acted in bad faith, finding that it fit within the "ancilliary effect" exception to Edelman, inasmuch as the award was only a part of a prospective order enforcing federal law. While the award of fees here, was not made as a means of punishing the defendant for its failure to obey a court order, the respondent nevertheless maintains, that the connection between an award of fees for bad faith, and an award such as that made here, is so strong, and so closely connected to orders enforcing prospective relief, that if one is "ancilliary" so is the other.

One rationale used by the Supreme Court in Hutto to explain its approval of an award of fees against a state defendant under 42 U.S.C. §1988, despite the statute's lack of specific authorization for such an award, is the similarity it found between attorneys' fees and costs. The Court found support for its holding allowing an award of fees "as a part of costs", under the statute in the fact that costs have traditionally been awarded by courts without regard for a state's Eleventh Amendment immunity. Thus in Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927), the Supreme Court upheld an award of costs despite the State's claim of immunity. An award of costs as authorized by Fairmont did not conflict with Edelman, the Court explained in Hutto, because:

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[7] See, Gagne v. Maher, 594 F. 2d at 342 n.5; Bond v. Stanton, 528 F. 2d 688 (1976), remanded, 429 U.S. 973 (1977); Edelman v. Jordan, supra, at 671, and n.13.

> Unlike ordinary "retroactive" relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him in to court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief.

437 U.S. at 695 n. 24.

The respondent, maintains, that an award of attorneys' fees generally serves the same purpose as an award of costs and thus should be treated the same. As the court stated in Souza v. Travisono, 512 F. 2d 1137, 1140-1141 (1st Cir. 1975);

> [Attorneys'] fees, to the extent allowable, seem to us generically to be the same as court costs. They are a part of the litigation expense deemed, for whatever reason, recoverable by the successful party or attorney. Any effort to distinguish for eleventh amendment purposes on the basis of theories of award would invite endless confusion. And to the extent states and state officials are, under our federal system, amenable to suit in federal courts, they should be responsible for costs and fees incidental to litigation to the same degree as others.

Like the Second Circuit Court of Appeals held in such cases as Fitzpatrick v. Bitzer, 519 F. 2d 559, 571-72 (2d Cir. 1975), aff'd in part, rev'd in part, 427 U.S. 445 (1976); Class v. Norton 505 F. 2d 123, 126 (2d Cir. 1974), Jordan v. Fusari 496 F. 2d 646, 651 (2d Cir. 1974), and in this case, the First and Fourth Circuits have also decided that an award of attorneys' fees fits within the "ancilliary effect" exception to Edelman when the award is incident to a judgement granting prospective relief.[8]

While the Third[11] and Sixth[12] Circuits have disagreed, the respondent maintains that logic and more recent authority, in particular the Supreme Court decisions cited above, support the position taken by the First, Second and Fourth Circuits.

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[8] Souza v. Travisono 512 F. 2d 1137 (1st Cir.) vacated and remanded on other grounds, 423 U.S. 809 (1975); Boston Chapter N.A.A.C.P., Inc. v. Beecher 504 F. 2d 1017, 1028-1030 (1st Cir.) cert denied, 421 U.S. 910 (1975); Thonen v. Jenkins 517 F. 2d 3, 7-8 (4th Cir. 1975). See also, Brandenburger v. Thompson 494 F. 2d 885, 888 (9th Cir. 1974), and Bond v. Stanton 528 F. 2d 688, 689-692, vacated and remanded in light of P.L. 94-559, 555 F. 2d 172 and n.1 (7th Cir. 1977).

[11] Skehan v. Board of Trustees, 501 F. 2d 31, 41-42, and n.7 (3rd Cir. 1974), vacated and remanded, 421 U.S. 983 (1975), remanded, 538 F. 2d. 53 (1976) (en banc) cert. denied, 429 U.S. 979 (1976)

[12] Jordan v. Gilligan 500 F. 2d 701, 705-10 (6th Cir. 1974), cert. denied, 421 U.S. 991 (1975)

CONCLUSION

The Court should reject petitioner's arguments that certiorari be granted in this case for at least two reasons. First, petitioner's argument that an award of attorneys' fees against the state conflicts with Edelman v. Jordan, supra, rests on the erroneous conclusion that Congress cannot, consistent with section 5 of the Fourteenth Amendment, displace a state's sovereign immunity in the absence of a judicial determination that a meritorious constitutional claim exists. This argument has previously been rejected by this Court and every court that has considered it. Secondly, since this case can be resolved without consideration of petitioner's second Question Presented, it would be a departure from precedent to grant the petition for certiorari to resolve any conflict among the various courts of appeals on this issue.

For these reasons, the petition for certiorari submitted by the petitioner, Edward Maher should be denied.

Respectfully submitted,

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November 1979

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OPINIONS BELOW

The opinion of the court of appeals *(Pet. App., pp. 1a-18a)* is reported at 594 F.2d., 336.

The opinion of the district court *(A. 83-91)* is reported at 455 F. Supp. 1344.

JURISDICTION

The judgement of the court of appeals *(Pet. App., pp. 19a-20a)* was entered on March 9, 1979. Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including June 22, 1979. The petition for a writ of certiorari was filed on June 21, 1979, and was granted on October 1, 1979 *(A. 92)*, at which time the Court also granted respondent's motion for leave to proceed *in forma pauperis*. The jurisdiction of this Court rests upon 28 U.S.C. §1254(l).

QUESTIONS PRESENTED

1. Whether in an action combining a constitutional claim under 42 U.S.C. §1983 with a statutory claim under the Social Security Act, which is subsequently settled by entry of a consent decree, and the merits of the §1983 claim are never determined, an award of attorney's fees against the Connecticut Commissioner of Income Maintenance, in his official capacity, to be paid out of State funds, is authorized by the Civil Rights Attorney's Fees Awards Act of 1976.

2. Whether, as the Court of Appeals has alternatively ruled, the award of the attorney's fees against the State of Connecticut in this action was permissible as an "ancillary effect" under *Edelman v. Jordan*, 415 U.S. 651 (1974), and therefore not barred by the Eleventh Amendment.

STATUTES INVOLVED

United States Code, Title 42:

> §602. *State plans for aid and services to needy families with children; contents; approval by Secretary*
>
> (a) A State plan for aid and services to needy families with children must . . . (7) except as may otherwise be provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earnings of any such income;
>
> §1983. *Civil action for deprivation of rights*
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> §1988. *Proceedings in vindication of civil rights*
>
> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other

than the United States, a reasonable attorney's fee as part of the costs.
As amended Pub. L 94-559, §2, Oct. 19, 1976, 90 Stat. 2641.

STATEMENT

The plaintiff, a working recipient of public assistance under Connecticut's program of Aid to Families with Dependent Children (AFDC), brought this action in the United States District Court against the Commissioner of Social Services (now called Commissioner of Income Maintenance) in which she alleged that, in computing the amount of her monthly AFDC award, Connecticut's policies and practices governing of work-related expenses were in conflict with §402(a)(7) of the Social Security Act. 42 U.S.C. §602(a)(7). *Complaint, paragraph 37, A.4.*

Section 602(a)(7) provides, *inter alia*, that the State agency shall disregard ". . . any expenses [which are] reasonably attributable to the earning of any such income."[1]

More specifically, the plaintiff claimed that the State's regulations were being applied in a way that deprived her of the full amount of work-related expense deductions to which she was entitled, allegedly by setting maximum food and transportation (by private automobile) expenses. *Complaint, paragraphs 1, 2, 15 and 16, A.4, 7,* and by refusing to consider work-related clothing expenses. *Id., paragraph 17, A.8.*

The plaintiff claimed also that the Department's practices and policies violated the Equal Protection Clause of the Fourteenth Amendment because they resulted in "invidious discrimination against persons whose work-related expenses exceed the allowances set forth in Index 332.31 . . . by forbidding plaintiff and the class she represents[2] ever from controverting the presumption that their work-related expenses exceeding the transportation and food allowances on Index 332.31 are unreasonable." *Complaint, paragraph 28, A.9.*

Plaintiff claimed further that the Department's practice and policy violated the Due Process Clause of the Fourteenth Amendment in that they ". . . establish an irrebutable presumption that the plaintiff's work-related transportation and lunch allowances are unreasonable and operate to deny plaintiff and the class she represents a fair opportunity to rebut it," and that "[t]he standard lunch and transportation allowances . . . are arbitrary in that they were not developed by a statistically fair averaging, nor do they reflect current prices. *Complaint, paragraph 32, A.10.*

The complaint also recited that the bringing of this action in the federal district court was authorized, *inter alia,* under 42 U.S.C. §1983, and that jurisdiction was conferred by 28 U.S.C. §1343. *Complaint, paragraphs 3-4, A.5*

Prior to instituting this action in federal district court, plaintiff requested an administrative fair hearing pursuant to §17-2a, Connecticut General Statutes to contest the Department's disallowance of the allegedly work-related food, transportation and clothing expenses which she subsequently choose to contest in this action.[3] *Memorandum of Decision, Adm. Fair Hearing, A. 14-16.*

The administrative fair hearing memorandum of decision upheld the Department's decision disallowing plaintiff's claims for additional work-related lunch and transportation expenses, but directed the district office to "assess the actual needs of the appellant's work connected clothing expense and to allow those as actual expenses." (A.16)

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[1] The pertinent federal regulation, 45 C.F.R.§233.20(a) (3)(iv)(a), provides that, in determining the availability of income and resources, ". . . [i]ncome equal to expenses reasonably attributable to the earning of income . . ." will not be included as income.

[2] This action was not certified as a class action until the Consent Judgment (A.76) was entered, and, in that judgment the class was not defined. There was never more than a single party-plaintiff (Virginia Gagne) in the action throughout the proceedings in the district court. (footnote not in original text).

[3] In the administrative hearing, plaintiff claimed, additionally, that she was entitled to claim her 16 year old son's work expenses. Thereafter, she apparently abandoned this latter claim.

The plaintiff, through her attorneys then appealed the administrative hearing decision to the state Court of Common Pleas, pursuant to §17-2b, Connecticut General Statutes.[4]

During the pendency of this action, both sides employed discovery techniques. The defendant filed interrogatories; the plaintiff filed two sets of interrogatories, took a deposition and filed a request for admission.

The defendant, on May 29, 1975, while this action was pending, amended the regulation initially under challenge herein, Index 332.31, revised September 11, 1973. (A.65) The amended regulation provided expressly for deduction of any expenses reasonably attributable to earning of income. (A.67). Thereafter, plaintiff filed interrogatories, presumably to ascertain the significance of the defendant's revised Index 332.31, *supra*.

In September, 1976, plaintiff filed an amended complaint which was very similar to the original complaint, but containing additional allegations that the Department's new policy, as implemented allegedly still resulted in routine disallowances of expenses in excess of standard allowances (Amended Complaint, paragraph 26, A.59); and a new second cause of action that the Department's practices did not result in properly informing AFDC recipients of their right to claim work- related

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[4] Thereafter, this action was instituted in U.S. District Court. That appeal remained pending in the state court throughout the entire period of this action in the federal district court. After entry of the consent judgment herein, plaintiff "revived" that appeal and it is still an active case. The defendant has moved to dismiss on the grounds that the consent decree entered in this action is *res judicata*. A decision is still awaited on that motion.

expense deductions other than those specified in department policy, nor in properly informing them whether or not their claimed work-related expenses had been allowed, nor in properly notifying recipients of their right to challenge the Department's determinations on claims for work-related expense deductions. (A61-62). The defendant denied these allegations.

Eventually, after negotiations between the parties, and the exchange of several proposed drafts, a consent decree (A.76) was entered on March 2, 1977, and, thereafter, on April 4, 1977, the plaintiff moved for an award of attorney's fees pursuant to The Civil Rights Attorney's Fees Awards Act of 1976, *supra*.

A hearing on the motion was held on May 16, 1977; and on August 1, 1978, the district court, which, presumably, had been awaiting the Supreme Court's decision in *Hutto v. Finney*, 437 U.S. 678 (1978), entered its ruling awarding attorney's fees against the State in the amount of $3,012.19 to plaintiff's attorneys. The State thereupon appealed that decision to the U.S. Court of Appeals (2nd Circuit); and the respondent cross-appealed the district court's reduction of the amount of the attorney's fees they had requested.

The Court of Appeals affirmed the district court's award of attorney's fees to the plaintiff's attorneys; and remanded on the respondent's cross-appeal.

The State-Petitioner's petition for certiorari was granted by this court on October 1, 1979.

SUMMARY OF ARGUMENT

I. The Civil Rights Attorney's Fees Awards Act of 1976, Public Law 94-559, amending and codified in 42 U.S.C. §1988, does not and cannot, under the circumstances present in this case, serve as congressional authorization for an award of attorney's fees against the State of Connecticut, because under this Court's holding in *Fitzpatrick v. Bitzer*, 427 U.S. ,445 (1976), before Congress can abrogate a State's Eleventh

Amendment immunity, it must be acting pursuant to §5 of the Fourteenth Amendment to enforce that Amendment's substantive guarantees. Therefore, as explained *infra*, since the "threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent," *Edelman v. Jordan*, 415 U.S. 651, 672, the award of attorney's fees in this case is barred by the Eleventh Amendment.

In *Hutto v. Finney*, 437 U.S. 678 (1978) this Court did uphold an award of attorney's fees against the State of Arkansas which had been made by the court of appeals under the authority of the Fees Act. But in that case it had been found that conditions in the Arkansas prison system constituted cruel and unusual punishment in violation of the Eight and Fourteenth Amendments.

This is not such a case. This is a case (as was Edelman v. Jordan, supra) brought under 42 U.S.C. §1983 in which the underlying claim is based upon Social Security Act provisions dealing with the Aid to Families with Dependent Children (AFDC) program. The decision in this case was entered on March 9, 1979, before this Court released its decision in *Chapman v. Houston Welfare Rights Organization*, ____ U.S. ____, 99 S. Ct. 1905 (May 14, 1979), and, consequently, the court of appeals did not have the benefit thereof.[5]

In *Chapman, supra*, this Court has held, while discussing jurisdictional problems presented by that case, that §1983, standing alone, provides no protection for civil rights since it does not provide for any substantive rights at all. ____ U.S., at ____, 99 S. Ct., at 1916. *Chapman*, further provides, *inter alia*, that:

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[5] A motion to re-argue before the court of appeals would have served no purpose however, since, in its decision, the court of appeals upheld the district court's award of attorney's fees on the alternate ground that it was but a permissible "ancillary effect" under *Edelman v. Jordan*, 415 U.S. 651, (1974), as is discussed *infra*.

> "It is only when the underlying statute is *not* a civil rights act that § 1983 need be invoked by those in claimant's position to support jurisdiction. And in such cases by hypothesis, §1983 does not provid[e] for the protection of civil rights." *Id.* (emphasis added).

Therefore, before it can be determined whether or not plaintiff's claim is one seeking to enforce a substantive guarantee of the Fourteenth Amendment,[6] reference must be made to the Act of Congress which forms the underlying substantive basis for the §1983 claim. In this case, as indicated *supra*, that Act is the Social Security Act. *Chapman, supra*, tells us further that the Social Security Act does not deal with the concept of "equality" or with the guarantee of "civil rights" as those terms are commonly understood. ____ U.S., at ____, 99 S. Ct. at 1917.

It must therefore be concluded that when the plaintiff in this action brought a §1983 claim in which the underlying claim was based on the Social Security Act, she was *not* attempting to enforce a substantive guarantee of the Fourteenth Amendment. Therefore, the Fees Act cannot supply "the threshold fact of congressional authorization" under which the State's Eleventh Amendment immunity could be abrogated.

II. Even if the Fees Act, notwithstanding the foregoing analysis, were found to authorize an award of attorney's fees against a State in an action combining a §1983 claim with a statutory Social Security Act claim, as the court of appeals has held in this case, the plaintiff should not have been adjudged to be "the prevailing party" under the Fees Act, since she did not obtain the relief she sought when she claimed that the State had improperly disallowed certain of her work-related expenses for food, clothing and transportation.

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[6] Which is the necessary requisite under *Fitzpatrick v. Bitzer, supra*, to empower Congress to abrogate a State's Eleventh Amendment immunity.

The plaintiff requested and received an administrative fair hearing on these claims in which the Department's decision was upheld. The court of appeals rejected the State's claim that the administrative hearing decision was *res judicata* on this issue (Pet. App., p. 13a, n.7), but that decision is nonetheless highly probative evidence as to the lack of merit in the plaintiff's claim; and the plaintiff attached that hearing decision as an exhibit to her complaint. *A. 14.*

III. The court of appeals has upheld the district court's award of attorney's fees against the State in this case on the additional ground that the Eleventh Amendment is no bar to such an award because it "fits within the 'ancillary effect' doctrine [of Edelman v. Jordan, supra] when the award is incident to a judgment granting prospective relief." *Pet. App. p. 10a.*

The "ancillary effect" doctrine was carefully defined by this Court in *Edelman* when it explained therein that a court order limited to prospective injunctive relief may nevertheless require state officials to expend money from the state treasury in complying with such a decree. In such a case, the Court pointed out, "the fiscal consequences to state treasuries in these cases were *the necessary result of compliance with decrees which by their terms were prospective in nature* . . . . [s]uch an *ancillary effect* on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra.*" 415 U.S., at 667, 668 (emphasis added).

In upholding the district court's award of fees against the State in this case, the Second Circuit appears to have, unwarrantedly, expanded the "ancillary effect" doctrine of *Edelman* to include a situation "when the award is incident to a judgment granting prospective relief." *Pet. App., p. 10a.* Clearly, the award of fees in this case was *not* "the necessary result of compliance [with a] decree[s] which by . . . [its] terms . . . [was] prospective in nature."

ARGUMENT

I.

THE FEES ACT DID NOT SUPPLY, IN THIS CASE, THE "THRESHOLD FACT OF CONGRESSIONAL AUTHORIZATION" WHICH IS NECESSARY TO ABROGATE A STATE'S ELEVENTH AMENDMENT IMMUNITY.

A. *The Impact of Chapman v. Houston Welfare Rights Organization* ___ U.S. ___, 99 S. Ct. 1905, *On the Court of Appeals Decision.*

In *Edelman v. Jordan*, 415 U.S. 651 (1974) this court held that retroactive welfare benefits awarded to plaintiffs by a federal district court by reason of a wrongful denial of benefits by Illinois officials prior to the entry of the court's order determining the wrongfulness of their actions, violated the Eleventh Amendment. The Court stated, *inter alia*, that "[T]hough a §1983 action may be instituted by public aid recipients . . . a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include retroactive award which requires the payment of funds from the state treasury . . ." 415 U.S., at 676-677.

The court of appeals, in upholding the award of fees against the State in this case, held, *inter alia*, that although the Eleventh Amendment generally bars federal court awards of compensatory relief to be paid from a State treasury, "it is within Congress' Fourteenth Amendment power to authorize a fee award when a party prevails [under the Fees Act] as long as the pendent constitutional claim is a substantial one and arises out of the same operative facts." *Pet. App. p. 12a.*

The Petitioner submits that the prior decisions of this Court do not support this holding of the court of appeals; and that the holding, in effect, circumvents the decision of this Court in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Subsequent to *Edelman*, this Court held in *Fitzpatrick v. Bitzer, supra*, that Congress has the power, when acting pursuant to §5 of the Fourteenth Amendment, to enact legislation authorizing federal courts to award attorney's fees against a State as a means of enforcing that Amendment's substantive guarantees. In so doing, however, the Court distinguished that case from *Edelman v. Jordan, supra*, when it stated that "[O]ur analysis [in Fitzpatrick] begins where *Edelman* ended, for in this Title VII case the 'threshold fact of congressional authorization,' 415 U.S., at 672, to sue the State as employer is clearly present." 427 U.S., at 452.

More recently, in *Hutto v. Finney*, 437 U.S. 678 (1978), an award of attorney's fees to be paid from funds of the State of Arkansas awarded by the Court of Appeals pursuant to the Fees Act, *supra*, was upheld by this Court. However, in *Hutto*, it was found that conditions in the Arkansas prison system constituted cruel and unusual punishment in violation of the Eight and Fourteenth Amendments. The instant case is distinguishable from *Hutto* in that there was no finding of a deprivation of any of plaintiff's constitutional rights.

Moreover, this Court itself, in *Hutto*, distinguished that case from *Edelman v. Jordan, supra*, when it stated, *inter alia:*

> ". . . [F]inally, the claims asserted in *Employees* and in *Edelman v. Jordan* . . . were based on a statute rooted in Congress Art. I power . . . *Edelman v. Jordan, supra*, at 674 (underlying claim based on Social Security Act provisions dealing with aid to aged, blind, and disabled, 42 U.S.C. §§1381-1385). In this case, as in *Fitzpatrick v. Bitzer*, 427 U.S. 445, the claim is based upon a statute enacted to enforce the Fourteenth Amendment . . . ."
> 437 U.S., at 698 n. 31.

The factual situation in the present case is very similar to *Edelman* (except that it is an award of attorney's fees rather than retroactive welfare benefits which is at issue) in that it is an action brought by a recipient of public welfare benefits under 42 U.S.C. §1983 in which a constitutional claim has been combined with an underlying statutory claim based upon the Social Security Act. In *Edelman* the underlying claim dealt with aid to aged, blind, and disabled, 42 U.S.C. §§1381-1385, whereas in this action the claim deals with aid to families with dependent children (AFDC) 42 U.S.C. §601, *et seq*. It is submitted, therefore, that this case should be controlled by this Court's decision in *Edelman* and not by the decision in *Hutto v. Finney, supra*, since in this case, as in *Edelman*, the plaintiff was not seeking to enforce any of her "civil rights" under the Fourteenth Amendment — she was merely challenging the alleged disallowance of certain work-related expenses under the AFDC program.

In *Edelman v. Jordan, supra*, merely because the action was brought under §1983 and an equal protection claim was combined with the underlying statutory claim, there is no indication therein that the Court viewed the action as one involving the enforcement of "civil rights." The Court indicated that a State's Eleventh Amendment immunity is not lost in such a case when it stated:

> "[I]t is of course true that *Rosado v. Wyman* 397 U.S. 397 (1970), held that suits in federal court under §1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States. But it has not heretofore been suggested that §1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself . . . ."
> 415 U.S., at 676, 677.

Just recently in *Chapman v. Houston Welfare Rights Organization*, 47 U.S.L.W. 4528, (May 15, 1979), this Court in discussing jurisdictional questions presented by that case, shed further light upon "civil rights" actions brought under § 1983 when it stated, *inter alia:*

> "Under § 1343(3) [of 28 U.S.C.], a civil action must be both 'authorized by law' and brought to redress the deprivation of rights 'secured by the constitution or by an Act of Congress providing for equal rights.' Section 1983, when properly invoked, satisfied the first requirement: it ensures that the suit will not be dismissed because not 'authorized by law.' But it cannot satisfy the second, since by its terms, as well as its history, it does not provide any rights at all.
>
> "We reach a similar conclusion with respect to the argument that § 1983 is a statute 'providing for the protection of civil rights, including the right to vote'. Standing alone, § 1983 clearly provides no protection for civil rights since, as we have just concluded, § 1983 does not provide any substantive rights at all. To be sure, it may be argued that § 1983, does in some sense 'provid[e] for the protection of civil rights' when it authorizes a cause of action based on the deprivation of civil rights guaranteed by other Acts of Congress. But in such cases, there is no question as to jurisdiction, and no need to invoke § 1983 to meet the 'civil rights' requirements of § 1343(4); the Act of Congress which is the actual substantive basis of the suit clearly suffices to meet the requisite test. It is only when the underlying statute is *not* a civil rights act that § 1983 need be invoked by those in claimants' position to support jurisdiction. *And in such cases, by hypothesis, §1983 does not 'provide[e] for the protection of civil rights.'* "
>
> (Emphasis added, footnote omitted). ____ U.S., at ____, 99 S. Ct., at 1916.

Further along in its opinion, the Court went on to state, *inter alia:*

> "[T]he Social Security Act does not deal with the concept of 'equality' or with the guarantee of 'civil rights,' as those terms are commonly understood . . . ." *Id.*, ____ U.S., at ____, 99 S. Ct., at 1917.

And, near the close of its opinion, the Court stated:

> ". . . the courts of appeals have consistently held that the Social Security Act is not a statute providing for 'civil rights' . . . [W]e endorse those holdings, and find that a similar conclusion is warranted with respect to § 1343(4) as well . . ." *Id.*, ____ U.S., at ____, 99 S. Ct., at 1918.

It is true, of course, that unlike the plaintiffs in *Chapman, supra,* the plaintiff in this action *did* recite in her complaint, separate constitutional claims. (Set forth supra, at p.4). But these "constitutional" claims are themselves based upon the provisions of the Social Security Act., and were it not for the existence of §602(a)(7) of the Act, the recital of these "constitutional" claims would be meaningless.

It has become customary for a plaintiff in a case where the underlying claim is based on the Social Security Act, to set forth in the complaint at least one "equal protection" claim and/or one "due process" claim, and to recite that the action is brought under 42 U.S.C. § 1983. The complaint then proceeds to set forth the underlying Social Security Act "statutory" claim. Under the liberal "substantiality" test of *Hagans v. Lavine*, 415 U.S. 528, (1974), there is then little chance that the complaint will be susceptible to a motion to dismiss for a lack of federal court jurisdiction.

In *Chapman, supra,* Mr. Justice Stewart took note of this practice in a dissenting opinion when he observed:

> "[F]inally, even a welfare recipient with a federal statutory claim may sue in federal court if his lawyer can link this claim to a substantial constitution contention. And under the standard of substantially established by *Hagans v. Lavine*, 415 U.S. 528, such a constitutional claim would not be hard to construct." ___ U.S., at ___, 99 S. Ct., at 1946.

In *Hutto v. Finney, supra*, it was stated, *inter alia*, that when it passed the Fees Act, "Congress undoubtedly intended to exercise that power [the plenary power it has to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment] and to authorize fee awards payable by the States when their officials are sued in their official capacities" (437 U.S., at 693-694). After this Court's opinion in *Chapman, supra*, that statement does not appear to be analytically correct, at least when referring to §1983 actions. Just as §1983 by itself (as pointed out in *Chapman,)* "provides no protection for civil rights since . . . [it] does not provide any substantive rights at all," the Fees Act, §1983, by itself, does not import "the threshold fact of congressional authorization," *Fitzpatrick v. Bitzer, supra*, into a claim asserted under §1983. As *Chapman* instructs, §1983 *authorizes* a cause of action to be brought thereunder, but the Act of Congress which is thereby imported into a §1983 action must itself contain the actual substantive basis of the civil rights guarantee before the Fees Act can be said to provide the authorization for the award of attorney's fees against the State.

In this case the Social Security Act, the underlying claim in the plaintiff's §1983 action, clearly provided no substantive basis to enforce a Fourteenth Amendment guarantee. Under this analysis, it was incorrect for the court of appeals to find, in this case, a congressional intent, under the Fees Act, to authorize an award of attorney's fees against the State.

B. *The Legislative History Of the Fees Act.*

It would appear from the foregoing discussion that it is unnecessary to refer to the legislative history of the Fees Act in order to determine the congressional intent contained therein. But if that history is to be consulted, there are several factors which militate against finding, in the Fees Act, an intent by Congress to authorize an award of attorney's fees against the State under the circumstances of this case.

The court of appeals relied heavily, in its decision, on the House Report, H.R. Rep. No. 1558, 94th Cong., 2d. Sess. at 4 n. 7 (1976), *Pet. App., p. 7a*, which mentioned specifically a situation where a plaintiff joins a claim under one of the statutes enumerated in the Fees Act with a claim that does not allow attorney's fees, and prevails on the non-fee claim. The *Senate* Report, No. 94-1011, however, contains no such language, and, it is to be noted, it was the *Senate* Bill which was passed in *lieu* of the House Bill. *1977 U.S. Code Cong. & Adm. News*, p. 6338. Moreover, there is no indication in the *Senate* Report that Congress intended to treat welfare benefits cases brought under the Social Security Act as "civil rights" cases. The types of cases specifically mentioned in the Senate Report include cases involving racial discrimination, voting rights, public accomodation, housing discrimination, and discrimination in a private restaurant. There is no mention of cases brought to enforce claims to public welfare benefits under the Social Security Act. *Id.*, pp. 6340-6342.

The *purpose* of the Fees Act, as stated in the Senate Report is "to remedy anomolous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 1975, and to achieve consistency in our civil rights laws." *1977 U.S. Code Cong. & Adm. News*, p. 6339. There is no indication here that Congress was attempting to transform a claim brought under the Social Security Act into a civil rights case.

Another difficulty presented by ascribing to Congress such an intent is that presented by the requirement of 28 U.S.C. §2281[7] that, in an action such as this one, a three-judge court was required to hear the plaintiff's claim which sought to enjoin the State's regulation on the grounds of its unconstitutionality. Indeed, the plaintiff requested in her complaint that a three-judge court be convened pursuant to 28 U.S.C. §§2281, 2284. (A.5), but such a court was never convened. Instead, a single-judge court dealt with the problems of discovery and accepted and entered judgment on the consent decree. This was perfectly permissible under the doctrine of *Hagans v. Lavine, supra,* so long as only the "statutory" claim was being considered. It thus appears clear that the plaintiff could not have prevailed on her constitutional claims since the requisite convocation of a three-judge court under §2281 never came into being. The single-judge court was empowered to act only on the plaintiff's "statutory" claim.

C. *The Plaintiff Should Not Have Been Adjudged The Prevailing Party" Even On Her Statutory Claim.*

The district court, in rejecting the State's claim that the plaintiff was not the prevailing party in this case found that, through the consent decree the plaintiff received substantially all of the relief she originally sought in her complaint and "thus she is entitled to an attorney's fee even though she did not prevail in every particular." *(A.87)*

However, the plaintiff, prior to bringing this action requested and received an administrative fair hearing on the disallowed items of work-related expenses of food, private automobile mileage allowance and clothing which formed the crux of her claim, (Complaint, paragraphs 12-18, *A. 7-8)* that

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[7] §2281 of Title 28 U.S.C. was not repealed until August 12, 1976 well after this action was brought. The repeal of §2281 was not applicable to any action commenced on or before August 12, 1976, under §7 of Public Law 94-381

the State's policies and practices were in conflict with the requirement of (42 U.S.C. §602(a)(7) that she be allowed all deductions reasonably attributable to the earning of income. At the administrative hearing the Department's decision was upheld. *A. 14-16.* That decision does not make clear whether the Department would allow plaintiff to show she incurred work-related expenses in excess of the Department's standard allowances, or whether the plaintiff failed to prove she actually had such expenses. The plaintiff's attorney's claimed the former, and the State claimed the latter was the case.

It cannot be disputed however, that when the State sought, in this action, corroboration of the plaintiff's automobile mileage expenses by means of interrogatories, the plaintiff was unable to provide the needed information on her odometer reading and monthly usage. *Answers to Interrogatories, Questions 15, 26, A. 23, 24.*

At the time the consent decree was entered, plaintiff abandoned her claims for additional food and clothing expenses. The Department did agree to increase *prospectively,* beginning in March, 1977, it *standard allowance*[8] for mileage (the amount paid without requiring proof thereof) for private automobile use, from $.06 to $.12 cents a mile *(A. 77-78),* and to use a more elaborate and informative notice of work-related expenses allowed to a recipient, and a more detailed explanation of how they had been computed. *A. 80-82.*

However, most of the provisions of the consent decree were restatements of what federal law required and what the Department claimed it had been doing all along.

It appears to be plaintiff's view that she had established that she had prevailed on her claim that the Department did not allow a recipient to prove work-related automobile mileage expenses in excess of the Department's standard allowance because, even after the Department amended its policy to provide expressly for any expenses attributable to earning income *(A.67)*, its subsequent answers to plaintiff's interrogatories showed that, in a survey of two district offices, virtually no recipients were given automobile mileage expense greater than the standard allowance. The fallacy of this inference is, of course, that the plaintiff did not ask how many recipients *claimed* expenses greater than that allowance. Without that additional information, the first answer is not very significant.

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[8] However, under *Shea v. Vialpando,* 416 U.S. 251, (1974) the Department was not *required* to establish any such standard allowances but "a standard allowance would be permissible, and would substantially serve petitioners' inerests in administrative efficiency, if it provided for individualized consideration of expenses. 416 U.S. at 265.

What does appear to be significant, however, is that during the entire period during which this action was pending there was only a single plaintiff as a party, and there were no intervenors, a situation that fails to lend credence to the merits of the plaintiff's claims.

Finally, it should be noted that when this litigation ended in a consent decree the State was not required, under its provisions, to change in any way its policy governing deductions for work-related expenses contained at Index 332.31. *A.67*, which was adopted prior to the filing of the plaintiff's amended complaint.

II.

THE PORTION OF THE DECISION BELOW WHICH HOLDS THAT THE AWARD OF ATTORNEY'S FEES AGAINST THE STATE WAS A PERMISSIBLE "ANCILLARY EFFECT" OF A DECREE LIMITED TO PROSPECTIVE INJUNCTIVE RELIEF IN A MISINTERPRETATION OF THIS COURT'S OPINION IN EDLEMAN V. JORDAN.

In *Edelman*, this Court explained that a court order limited to prospective injunctive relief may nevertheless require state officials to expend money from the state treasury in complying with such a decree: "[b]ut the fiscal consequences to state treasuries in these cases were *the necessary result of compliance with decrees which by their terms were prospective in nature* . . . [s]uch an *ancillary effect* on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra.*" 415 U.S., at 667-669 (emphasis added).

The court of appeals has held in this case that "an award of attorney's fees fits within the 'ancillary effect' doctrine[9] [of Edelman, supra,] when the award is incident to a judgment granting prospective relief" *Pet. App., p. 10a*, and goes on to state, *inter alia*, that the Supreme Court in a pre-*Edelman* summary decision, affirmed a three-judge court award of attorneys' fees against a state in *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), 409 U.S. 942 (1972); and that, in the Second Circuit "summary holdings of the Supreme Court are binding precedent." *Pet. App., p. 11a.*

But this Court has noted in Quern v. Jordan, ____ U.S. ____, ____, 99 S. Ct. 1139, 1143 n.5 (1979) that the list of summary affirmances overruled in *Edelman* was not intended to be exhaustive.

In *Edelman*, it was stated that the court's order requiring the State of Illinois to make retroactive payment to plaintiffs in that case was *not* "a necessary consequence of compliance in the future with a substantive federal question determination, but as a form of compensation to those whose applications were processed on the slower time schedule *at a time when petitioners were under no court- imposed obligation to conform to a different standard." 415 U.S., at 668 (emphasis added).* That statement is also true of the award of fees made against the State of Connecticut in the present case.

It is submitted that the award of attorney's fees entered by the distrct court in present action does *not* come within this Court's careful definition, *supra*, of an "ancillary effect." The Second Circuit has extended this Court's "ancillary effect" doctrine to include a situation "when the award is incident to a judgment granting prospective relief." *Pet. App., p. 10a.*

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[9] The court of appeals has pointed out that the circuits are divided on this issue. *Pet. App., p. 10a, n.4*

CONCLUSION

The judgment of the court of appeals, insofar as it affirmed the decision of the district court awarding attorney's fees to the plaintiff should be reversed, *Pet. App., p. 20a,* and the order of the court of appeals remanding respondent's cross-appeal vacated, and the cross-appeal dismissed.

Respectfully submitted,

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November 1979

FOR ARGUMENT

Supreme Court, U.S.
FILED
DEC 12 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 78-1888

EDWARD W. MAHER, Commissioner of
the Department of Income Maintenance,
State of Connecticut,
Petitioner,

v.

VIRGINIA GAGNE, Individually and on
Behalf of Others Similarly Situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1888

EDWARD W. MAHER, Commissioner of
the Department of Income Maintenance,
State of Connecticut,
Petitioner,

v.

VIRGINIA GAGNE, Individually and on
Behalf of Others Similarly Situated,
Respondent.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT*

BRIEF OF RESPONDENTS

OPINIONS BELOW

The decision of the Court of Appeals (Pet. A. 1a-18a) has now been reported at 594 F.2d 336 (1979). The opinion of the district court (A. 83-91) is reported at 455 F. Supp. 1344 (D. Conn. 1978).

QUESTIONS PRESENTED

1. Whether the Civil Rights Attorney's Fees Awards Act authorizes an award of attorneys' fees in a case raising federal constitutional and statutory claims under 42 U.S.C. section 1983, when the case is settled by consent decree prior to adjudication of the case on the merits.

2. Whether the awarding of attorneys' fees under the Civil Rights Attorney's Fees Awards Act against a state official acting in his official capacity is barred by the Eleventh Amendment.

CONSTITUTIONAL PROVISIONS

Eleventh Amendment, United States Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Fourteenth Amendment, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT

1. History of the Litigation.

As an incentive to encourage public assistance recipients to work, work-related expenses are deducted from an AFDC applicant's income in the process of determining eligibility for assistance and in determining the amount of assistance available to an eligible recipient. Under policies in effect when this case was filed in January, 1975, the Connecticut Department of Social Services (later called Department of Income Maintenance), limited the types and amount of work-related expenses which it would deduct from recipient's income. Specifically, Connecticut Department of Social Services Manual, Vol. I, Ch. III, Index 332.31, reprinted at A. 65-66, provided that only certain expenses enumerated in the Manual could be deducted and that the amounts allowed for lunches and automobile transportation were limited to 50 cents per working day and 6 cents per mile, respectively. Recipients whose actual expenses exceeded these amounts or who incurred work-related expenses not enumerated in the Manual were not permitted deductions for these amounts;[1] nor were recipients informed of which expenses, if any, were allowed by the Department. (A. 70-73).

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[1] In his Answer to the Complaint, the Commissioner of Social Services denied that the lunch and transportation allowances were maximums. (A. 17-19). However, during discovery, conducted in April, 1975, the Chief of Policy and Staff Services of the Department acknowledged that the allowances were intended as maximums:

> Q. I'm not really quite clear as to the Department's position that any amount requested in excess of the \$.06 cents a mile and the \$.50 cents a day is per se unreasonable? Is that your position?

[footnote continued]

Plaintiff, Virginia Gagne, filed this action in the United States District Court for the District of Connecticut on behalf of herself and all other AFDC recipients who had been injured by the Department's work-expense policies. She requested injunctive relief and a declaratory judgment that the Connecticut work-expense policies violated section 402 (a)(7) of the Social Security Act[2] and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. (A. 4-13). Her Complaint alleged that the plaintiff's actual transportation expenses were 13.9 cents per mile, as compared to the 6 cents per mile allowed by the State, and that her meal expenses were $1.65 per day, more than three times the amount allowed. (A. 8). The complaint alleged that plaintiff's claims were authorized by 42 U.S.C. §1983 and that the district court had jurisdiction under 28 U.S.C. §1343. (A. 5).

On May 29, 1975, five months after the Complaint was filed, the Department of Social Services amended its policies pertaining to work-related expenses. Under the revision, when expenses other than those listed in the Manual were claimed by recipients, they were to be referred by local welfare workers to the Office of State Deputy Commissioner for consideration. (A. 68-69). The practice of not notifying recipients of allowed expenses was not corrected. Moreover, in his written response to interrogatories filed shortly after the policy was revised, defendant continued to state that he did not allow work expenses other than those expressly listed in the Manual. (A. 34-35). And, in further responses, filed more than a year after the revised policy was adopted, defendant provided data which showed that virtually no recipients had received work expense deductions greater than those provided under the policy challenged in the original complaint. (A. 52-53). The responses further showed that the Department continued to place limits on the types of work expenses for which deductions would be allowed. (A. 48).

On September 10, 1976, plaintiff filed an Amended Complaint in which she alleged that the Department had revised its policies on May 31, 1975, but that as a matter of practice, expenses in excess of the State's maximums and for items not listed in the Manual continued to be denied. (A. 59-60). In addition to her original claims under section 402 (a)(7) of the Social Security Act and the Fourteenth Amendment, which were realleged, plaintiff alleged in the Amended Complaint that the Department's failure to provide notice to recipients of their right to claim work expense deductions in excess of the maximums in the policy Manual, and to inform recipients of which expenses, if any, were disallowed,

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A. Yes

. . .

Q. So then, I guess my last question would be, do you ever allow more than $.50 cents a day for lunches or more than $.06 cents a mile?

A. No, not to my knowledge.

(Deposition of Caroline Packard [R.21] at 43).

[2] Section 402(a) (7) of the Social Security Act requires that in administering the Aid to Families with Dependent Children program (AFDC) states must "take into consideration . . . any expenses reasonably attributable to the earning of . . . income." 42 U.S.C. §602(a) (7). In *Shea v. Vialpando*, 416 U.S. 251 (1974), this Court held that under section 402(a) (7), states may not adopt a standardized allowance for expenses attributable to the earning of income which does not allow an individual to deduct expenses that exceed the standard.

violated their right to procedural due process under the Fourteenth Amendment. (A. 59-63). Thereafter, plaintiff filed further discovery, a Motion for Certification of the Class, and an Application for the Convening of a Three-Judge District Court. (R. 35, 37, 38).

Shortly after plaintiff filed her Amended Complaint and related motions, settlement negotiations were instituted between the parties which led to the submission of a Consent Decree to the district court. The Consent Decree provided substantial relief to the plaintiff and her class. The Department agreed, subject now to the remedy of contempt, that limits would no longer be imposed on the work-related expenses available to recipients. (A. 76-77). It also agreed to increase its standards for determining usual costs for transportation from 6 cents to 12 cents a mile and to review all of its standards annually. (A. 77-78). Finally, defendant agreed to institute detailed procedures designed to inform recipients of their right to claim deductions in excess of the Department's standards and to enable them to challenge administratively any decisions denying deductions that were claimed. (A. 78-79). The Consent Decree was approved and entered by the district court on March 2, 1977.

2. The Attorneys' Fees Award

During settlement negotiations, the parties agreed that the issue of plaintiff's entitlement to attorneys' fees would be submitted to the district court for resolution following approval of the Consent Decree. (Tr. of hearing dated May 16, 1977, at 9-10). On April 4, 1977, plaintiff submitted a Motion for Attorneys' Fees which was supported by affidavits documenting the amount of time spent in litigating the case and the prevailing charges in the community. Following a hearing, the district court awarded fees to the plaintiff under 42 U.S.C. §1988 in the amount of $3,012.19.

In his opinion, Chief Judge T. Emmet Clarie found that plaintiff was the "prevailing party" because she had obtained, through the Consent Decree, "virtually all the relief sought in the Complaint." *Gagne v. Maher,* 455 F. Supp. 1344, 1346 (D. Conn. 1978). The court also rejected defendant's argument that plaintiff should not recover attorneys' fees because the defects in the state policies were inconsistent with a federal statute, rather than with the Constitution. With respect to this contention, Judge Clarie held that if the issue had been presented on a motion to dismiss, he would have ruled as a matter of law that there was federal jurisdiction over both the statutory and constitutional claims under the doctrine of *Hagans v. Lavine,* 415 U.S. 528 (1974), since plaintiff's complaints raised "several constitutional issues which are 'substantial'." 455 F. Supp. at 1348. Finally, the court found that hourly rate of $45 an hour to be fair and reasonable.[3]

The Court of Appeals for the Second Circuit, in an opinion by Judge Wilfred Feinberg, unanimously affirmed the award of attorneys' fees to plaintiff. It agreed with the district court that under 42 U.S.C. §1988 fees may be awarded to parties who obtain substantial relief without the necessity of a trial; and it held that on the facts of this case, plaintiff's lawsuit had been the basis for the change in the defendant's practices. 549 F.2d 336, 339-41 (2d Cir. 1979). It also held that fees could be awarded under section 1988 because plaintiff's constitutional claims were substantial and arose out of the same operative facts as the plaintiff's claims under the Social Security Act. 594 F.2d at 341. Finally, the court held that the award of attorneys' fees was not barred by the Eleventh Amendment because that provision is not applicable to attorneys' fees, which have only an "ancillary effect" on the state treasury and because, in any event, Congress has power under section 5 of the Fourteenth Amendment to set aside the state's immunity so long as the constitutional claims raised in the Complaint are substantial.

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[3] The district court disallowed counsels' time spent in seeking attorneys' fees, as well as one-half of the remaining time spent by plaintiff's counsel. It also reduced the fee by an additional one-third because plaintiff's attorneys were employed by a legal aid program which received some of its support under a program administered by the defendant. 455 F. Supp. at 1349-50. The court of appeals remanded the first of these issues for reconsideration, and affirmed as to the others. 594 F.2d at 343-45. These issues are not before the Court.

SUMMARY OF ARGUMENT

I

The Civil Rights Attorney's Fees Awards Act of 1976 requires that two conditions be met before fee awards can be made. First, the action must be brought to enforce a provision of one of the enumerated statutes including 42 U.S.C. § 1983, and second, the party seeking the fee must be the "prevailing party." The courts below properly held in this case that both of these conditions had been met.

Plaintiff's Complaint and Amended Complaint alleged that the defendant's work expense policies violated her rights to due process and equal protection of the laws. She additionally alleged that the defendant's policies violated the Social Security Act. Defendant claims that because the plaintiff coupled her constitutional claims with a statutory claim, her case is removed from the coverage of the Fees Awards Act. This argument must be rejected, because it is clear that the language of the statute authorizes the awarding of fees in *any* case brought under any of the enumerated statutes, focusing as it does on the nature of the action brought, rather than on the basis for the relief awarded. Plaintiff maintains that both her constitutional and statutory claims were properly brought under 42 U.S.C. § 1983, but that in any case, plaintiff's constitutional claims, standing alone, found by the courts below to be "substantial," are sufficient in themselves to support a fee award.

The legislative history of the Fees Awards Act strongly supports the joining of federal statutory claims with constitutional claims, since Congress in enacting the Fees Awards Act was well aware that many cases brought under the enumerated statutes involved such joinder of claims, and intended to continue the judicially established practice of awarding fees in such situations.

Permitting the inclusion of constitutional and statutory claims furthers the principle purpose of the Fees Awards Act to encourage the filing of meritorious litigation to enforce the Fourteenth Amendment while at the same time furthering the judicial policy of avoiding unnecessary constitutional adjudication.

Plaintiff was the prevailing party within the meaning of the Fees Act in this case although it was settled by Consent Decree. Legislative history clearly supports the awarding of fees to prevailing parties in consent judgment cases, recognizing that it promotes the private enforcement of those rights embodied in the Fourteenth Amendment. To suggest otherwise, would discourage the voluntary settlement of disputes, promote unnecessary litigation, and create the potential for conflicts of interest between plaintiff and counsel seeking an award of fees solely from the defendant.

The courts below found that the Consent Decree gave the plaintiff "virtually all the relief sought in the complaint," 445 F.Supp. at 1346, and that the defendant changed its policies only under the pressure of the lawsuit. The court of appeals' finding that the plaintiff's constitutional claims were substantial was sufficient to support an award of fees even though the case was not decided on the merits. Such a ruling is clearly consistent with congressional concerns regarding the filing of nuisance litigation, and is clearly consistent with the judicial goal of avoiding unnecessary decision making of constitutional questions.

In *Hutto v. Finney,* 437 U.S. 678 (1978), this Court held that Congress, acting pursuant to section 5 of the Fourteenth Amendment, intended to set aside the states' Eleventh Amendment immunity to an award of attorneys' fees under the Fees Awards Act although such a waiver was not explicit in the language of the statute. The Court determined that attorneys' fees were to be awarded as "a part of costs," which traditionally have not been subject to the Eleventh Amendment. This Court strongly suggested further that attorneys' fees, like costs, may not be subject to the Eleventh Amendment in any case. The court of appeals below reached a similar conclusion, holding that attorneys' fees are "incident to a judgment granting prospective relief," 594 F.2d at 341, relying on the "ancillary effect" exception set forth by this Court in *Edelman v. Jordan,* 415 U.S. 651 (1974).

However, even if fee awards are subject to the Eleventh Amendment, the Court in *Hutto* also found that Congress had the power under section 5 of the Fourteenth Amendment to authorize fee awards against state officials acting in their official capacities in cases decided on constitutional grounds. The fact that plaintiff's constitutional claims were not decided prior to entry of the Consent Decree should not change the result.

This Court's holdings in *Hutto* and earlier in *Katzenbach v. Morgan,* 384 U.S. 641 (1966), clearly established that Congress was acting well within its powers in sanctioning fee awards in cases resolved by consent decree. These cases substantiate that Congress posesses broad remedial powers under section 5 so long as it is acting rationally to enforce rights guaranteed under the Fourteenth Amendment. The legislative hearings, debates, and reports concerning the Fees Awards Act confirming that fee awards in settled cases would encourage litigation to enforce rights guaranteed by the Fourteenth Amendment, yet would have only minimal impact on state treasuries. By authorizing federal judges to make fee awards in cases settled by consent decrees when substantial constitutional claims are found, as in the instant case, Congress has insured that fees will be awarded only when litigants are enforcing Fourteenth Amendment rights and has furthered the strong judicial policy of avoiding the unnecessary determination of constitutional questions. *Hutto and Katzenback* both counsel, then, that such a rational enactment by Congress under section 5 is sufficient to displace any state Eleventh Amendment immunity which may exist.

ARGUMENT

Two terms ago in *Hutto v. Finney,* 437 U.S. 678 (1978), this Court held that the Civil Rights Attorney's Fees Awards Act of 1976, [hereinafter the Fees Awards Act][4] authorizes the assessment of attorneys' fees against state officials sued in their official capacities and that the Eleventh Amendment does not deny federal courts jurisdiction to make such awards in proper cases. This case differs from *Hutto* in only two respects. First, in the earlier case the plaintiffs' claims for relief arose only under the Fourteenth Amendment, whereas here, in addition to her claims under the Fourteenth Amendment, the plaintiff alleged that the defendant had violated her rights under the Social Security Act. Second, while the plaintiffs in *Hutto* had been awarded attorneys' fees after a favorable adjudication of their constitutional claims, fees were awarded in this case following the entry of a Consent Decree, in which there was no finding of a constitutional violation.

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[4] Pub. L. 94-559, 90 Stat. 2641, codified at 42 U.S.C. §1988.

Neither of these differences requires a result different from that in *Hutto*. Part I of this Brief establishes that plaintiff's action is covered by the express language of the Fees Award Act and that Congress expressly intended to cover actions such as this one. Part II establishes that the award of attorneys' fees under the Act, on the facts of this case, is not prohibited by the Eleventh Amendment.

1. The Courts Below Correctly Held That in This Case the Fees Awards Act Authorizes Fees to Be Awarded

Under the Fees Awards Act[5] two conditions must be met before attorneys' fees may be awarded. First, the action must have been brought "to enforce a provision of" one of the enumerated statutes, including section 1979 of the Revised Statutes, 42 U.S.C. §1983. Second, the party seeking the fee must have been the "prevailing party." Both of these requirements are satisfied in this case.

A. Plaintiff's Action Was Brought to Enforce a Provision of 42 U.S.C. §1983 Within the Meaning of the Fees Awards Act

Plaintiff's original and amended complaints both alleged that the defendant's work-expense policies violated her rights under the due process and equal protection clauses of the Fourteenth Amendment. Although they did not reach the merits, the district court and the court of appeals both found that these constitutional claims were substantial.[6] See 455 F. Supp. at 1348, 594 F.2d at 341.

If the constitutional claims asserted by the plaintiff were her only claims for relief, plaintiff clearly would be entitled to attorneys' fees under section 1988 if she were the prevailing party, since her action would have been brought to enforce a provision of section 1983. Defendant contends, however, that the fact that the plaintiff alleged in her complaint that the Department of Social Services' work-expense policies also violated the Social Security Act somehow removes her case from the coverage of section 1988. This argument must be rejected because it is clear that section 1988 permits fees to be awarded where pendent claims for relief under a federal statute such as the Social Security Act are properly joined with constitutional claims brought under section 1983.[7]

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[5] The Act provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[6] Plaintiff's equal protection and substantive due process claims were virtually identical to the constitutional claims that supported federal jurisdiction in *Shea v. Vialpando*, 416 U.S. 251 (1974). The State's assertion, Brief For Petitioner at 15, that plaintiff's constitutional claims have no substance without reference to section 402(a) (7) of the Social Security Act, is without foundation.

The joinder in a complaint of pendent Social Security Act claims with constitutional claims brought under section 1983 does not remove an action from coverage of section 1988.[8] As Mr. Justice Stevens stated in *Hutto,*

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[7] Revised Statutes §1979, 42 U.S.C. 1983, authorizes actions to be brought on behalf of any person who has been subjected to the deprivation, under color of state law, of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. §1983. In *Chapman v. Houston Welfare Rights Organization,* ___ U.S. ___, 99 S.Ct. 1905 (1979), four members of this Court expressed their belief that section 1983 provides a remedy for deprivations under color of state law of any federal statutory right. *See* ___ U.S. at ___, 99 S.Ct. at 1930, (White, J. concurring in the judgment); ___ U.S. at ___, 99 S.Ct. at 1944, (Stewart, J. dissenting); *but see,* ___ U.S. ___, 99 S.Ct. at 1919, (Powell, J. concurring). We endorse the opinions of these four Justices as well as the arguments made on behalf of the public assistance recipients in *Chapman* and urge their adoption by a majority of the Court. If the Court holds, as we urge, that violations of the Social Security Act may be remedied under the "and laws" language of section 1983, then plaintiff's action is expressly covered in all respects by section 1988.

[8] Since this case was settled prior to judgment, the existence of the constitutional claims in the complaint should be sufficient alone to support the fee award, and the Court need not decide whether plaintiff's statutory claims were properly brought under section 1983, see note 7, *supra,* or as an implied action under the Social Security Act itself. It should be noted, however, that in a long line of cases dating back to *King v. Smith,* 392 U.S. 309 (1968), this Court has held that violations of the public assistance provisions of the Social Security Act may be challenged in federal court if they are joined with constitutional claims which arise from the same operative facts as the statutory claims and which are substantial enough to support federal jurisdiction. *See, Miller v. Youakim,* 440 U.S. 125 (1979); *Quern v. Mandley,* 436 U.S. 725

[footnote continued]

"The [Attorney's Fees Awards] Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws . . . ." 437 U.S. at 694. An action alleging violations of the Fourteenth Amendment is an action brought to enforce 42 U.S.C. §1983 within the meaning of section 1988. See *Hutto v. Finney,* 437 U.S. 678 (1978). Nothing in the statute suggests that the constitutional claim must be the only claim alleged in an action before section 1988 may apply. Indeed, by focusing on the nature of the action brought, rather than on the basis for the relief awarded, the statutory language strongly suggests that so long as there is a claim under section 1983 or one of the other enumerated statutes in the complaint, it is immaterial what other claims may also be asserted.

This construction of section 1988 is supported by the statute's legislative history. The principal impetus for passage of the Fees Awards Act was this Court's decision

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(1978), *Batterton v. Francis,* 432 U.S. 416 (1977); *Philbrook v. Glodgett,* 421 U.S. 707 (1975); *Van Lare v. Hurley,* 421 U.S. 338 (1975); *Lascaris v. Shirley,* 420 U.S. 730 (1975); *Burns v. Alacala,* 420 U.S. 575 (1975); *Shea v. Vialpando,* 416 U.S. 251 (1974); *Edelman v. Jordan,* 415 U.S. 651 (1974); *Hagans v. Lavine,* 415 U.S. 528 (1974); *New York Dep't of Social Services v. Dublino,* 413 U.S. 405 (1973); *Carleson v. Remillard,* 406 U.S. 598 (1972); *Carter v. Stanton,* 405 U.S. 669 (1972); *Townsend v. Swank,* 404 U.S. 282 (1971); *Lewis v. Martin,* 397 U.S. 552 (1970); *Rosado v. Wyman,* 397 U.S. 397 (1970). These cases strongly suggest that, apart from section 1983, a private cause of action to remedy state violations of the Social Security Act may be implied directly from the Act itself. *See, Chapman,* ___ U.S. ___, 99 S.Ct. at 1931 n. 6, (White, J. concurring); *but see, Cannon v. University of Chicago,* ___ U.S. ___, 99 S.Ct. 1946, 1979 n. 11 (1979) (Powell, J. dissenting). Mr. Justice Harlan's opinion in *Rosado v. Wyman* appears to have already reached this conclusion in behalf of the Court, and it is required by the Court's recent Decisions regarding implied rights of action. *See generally, Cannon v. Univ. of Chicago,* ___ U.S. ___, 99 S.Ct. 1946 (1979); *Cort v. Ash,* 422 U.S. 66 (1975).

in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which held that plaintiffs who vindicate the public interest by successfully enforcing federal laws are not entitled to attorneys' fees in the absence of specific legislative authorization. Congress intended the Fees Awards Act to provide the necessary statutory authority in cases brought under section 1983 and the other enumerated statutes, and to thereby reinstate the rules developed by the federal courts prior to *Alyeska* for determining when fees should be available in section 1983 cases. As Congressman Railsback stated, "what we are really doing is codifying the practice that was going on prior to the Alyeska case." 122 Cong. Rec. 35117 (1976).[9]

Prior to *Alyeska,* lower courts had awarded attorneys' fees in cases joining federal statutory claims with constitutional claims. *See, e.g., Fairley v. Patterson,* 493 F.2d 598 (5th Cir. 1974); *Lee v. Southern Home Sites Corp.,* 444 F.2d 143 (5th Cir. 1971); *La Raza Unida v.*

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[9] The Report of the House Judiciary Committee similarly stated, "The Committee intends that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing" the bill. H. Rep. No. 94-1558, 94th Cong., 2d Sess. 8 (1976), [hereinafter H. Rep.]. Representative Kastenmeier stated, "[The bill] does not overturn law or practice, except the Alyeska case . . . ." 122 Cong. Rec. 35126 (1976). Senator Kennedy also stated on the Senate floor that the bill "is intended simply to expressly authorize the kinds of awards of legal fees that they had been allowing prior to the *Alyeska* decision." 122 Cong. Rec. 31472 (1976). Finally, both of the Committee Reports indicated their approval of the pre-*Alyeska* decisions with respect to the standards for awarding fees to prevailing plaintiffs, H. Rep. at 6, S. Rep. No. 94-1011, 94th Cong. 2d Sess. 4, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5912 [hereinafter S. Rep.]; and to prevailing defendants, H. Rep. at 6-7, S. Rep. at 5; for awarding fees pendente lite, H. Rep. at 8, S. Rep. at 5; and for computing the amount of fees to be awarded, H. Rep. at 8-9, S. Rep. at 6.

Volpe, 57 F.R.D. 94 (N.D. Cal. 1972). The Report of the House Judiciary Committee accompanying H.R. 15460 noted this practice and made it clear that the Committee wished to allow fee awards in such cases:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales v. Haines,* 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the nonconstitutional claim is dispositive. *Hagans v. Lavine,* 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the "substantiality" test, *see Hagans v. Lavine, supra; United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative facts.' *United Mine Workers v. Gibbs, supra* at 725.

H. Rep. at 4 n. 7.[10]

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[10] The State's argument that the House Report is not authoritative (Brief For Petitioner at 17), has no support in the legislative history. The Senate Judiciary Committee reported S. 2278 on June 29, 1976, and the House Judiciary Committee reported H.R. 15460 on September 15, 1976. When S. 2278 was brought up for consideration in the full Senate, Senator Kennedy, as floor manager, offered an amendment in the nature of a substitute which was intended to "confirm [sic] the language of the bill precisely to the House bill, H.R. 15460," by adding Title IX of Public Law 92-318 to the list of enumerated statutes in the Senate version. 122 Cong. Rec. 31472 (1976). It was this version which was passed by the Senate, with the addition of another amendment pertaining to

[footnote continued]

The view that cases joining federal statutory with constitutional claims were covered by the Act, was reiterated by Representative Drinan, the chief sponsor of H.R. 15460, when the bill reached the floor of the House:

> Section 1983 protects civil and constitutional rights from abridgement . . . . Under applicable judicial decisions, Section 1983 authorizes suits against State and local officials based upon Federal statutory as well as constitutional rights.

122 Cong. Rec. 35122 (1976). Representative Fish also cited a case involving both constitutional and federal statutory claims among the types of cases that would be covered by the Act. 122 Cong. Rec. 35126 (1976).

There is similar evidence of congressional intent in the Senate. The Report of the Senate Judiciary Committee noted that it was intended to reach suits brought under section 1983 to redress "violations of the Federal Constitution or laws by officials sworn to uphold the laws." S. Rep. at 4. During floor debate, Senator Kennedy described several types of cases that would be

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Internal Revenue cases. Because of Congress' desire to adjourn, there would not have been time for a conference of both Houses if the House had approved the House Committee bill which did not include the Internal Revenue amendment. The House, therefore, took up and approved S. 2278 in the exact form adopted by the Senate, rather than H.R. 15460. However, as noted by numerous House members, the two bills were "nearly identical," differing only with respect to the Senate's amendment pertaining to Internal Revenue cases. 122 Cong. Rec. 35115, 35122, 35125 (1976). Rep. Drinan also stated during the House debates on S. 2278 that "[b]ecause the bills are identical, with the limited exception of the Allen amendment, it is intended that the courts will interpret S. 2278 in accordance with House Report No. 94-1558, together with the Senate report and the debates in both Houses." 122 Cong. Rec. 35122. The House report was relied upon by this Court in *Hutto v. Finney. See* 437 U.S. at 694 n. 23.

covered under S. 2278. One of these was ***Bond v. Stanton,*** 504 F.2d 1246 (7th Cir. 1974) *cert. denied,* 420 U.S. 984, on attorneys' fees, 528 F.2d 688 (7th Cir. 1976), *vacated and rem.* 429 U.S. 973 (1976), *on remand,* 555 F.2d 172 (7th Cir. 1977) *cert. denied,* 438 U.S. 916 (1978), a case involving a state's denial of medical services required to be provided to public assistance recipients by Title XIX of the Social Security Act. 122 Cong. Rec. 33314 (1976). Similarly, Senator Abourezk, another member of the Judiciary Committee who supported S. 2278, stated, "This legislation is intended to cover cases based on both constitutional and statutory rights, including supremacy clause cases. See, 42 U.S.C. §1983." 122 Cong. Rec. 33315 (1976).[11]

The principle purpose of the Fees Awards Act was to encourage litigation to enforce the civil rights laws passed pursuant to the Fourteenth Amendment. S. Rep. at 5; H. Rep. at 1, 9; 122 Cong. Rec. 33313 (1976) (remarks of Sen. Kennedy) ("In enacting the basic civil rights attorneys fees awards bill, Congress clearly intends to facilitate and to encourage the bringing of actions to enforce the protections of the civil rights laws."). *See also,* 122 Cong. Rec. 35123, 35127, 35128 (1976), (remarks of Reps. Drinan, Holtzman, and Seiberling).

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[11] It is true that with the exception of the passage from the House Report, these statements appear to assume that federal statutory claims can be brought under section 1983. However, the Court need not decide that question here. The language of §1988 is broad enough to include cases joining statutory and constitutional claims whether or not statutory claims may be reached in their own right under section 1983. The legislative history of the Fees Awards Act, quoted in the text, shows Congress' desire to include these cases under whatever legal theory they might be authorized. Even if this Court were to hold in a future case that there is no cause of action to enforce the Social Security Act either under section 1983 or the Act itself, it is clear that under the law at the time this case was instituted and settled, all of the claims alleged in the complaint were proper. Nothing more is required.

Inclusion of cases joining pendent federal statutory claims with constitutional claims serves this purpose, since parties might be deterred from bringing suit if they knew they could be denied fees solely because the court refused to decide their constitutional claims. At the same time, it encourages an orderly process of constitutional adjudication. As Mr. Justice Stevens stated for the Court last term, "'[i] f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *New York City Transit Authority v. Beazer,* 440 U.S. 568, 582 (1979) *quoting from Spector Motor Co. v. McLaughlin,* 323 U.S. 101, 105 (1944); *County Court of Ulster County v. Allen,* ___ U.S. ___, 99 S. Ct. 2213, 2223 (1979). However, this principle would be violated if courts were forced to decide a plaintiff's constitutional claims merely to determine whether he were entitled to a fee award. *See, e.g., Southeast Legal Defense Group v. Adams,* 436 F. Supp. 891, 895 (D. Ore. 1977). These interests strongly counsel against a construction of section 1983 which would bar fee awards merely because a plaintiff's constitutional claims were not decided on the merits.

B. Plaintiff Was a Prevailing Party Within the Meaning of the Fees Awards Act Because She Obtained Significant Relief Through the Consent Decree and the Claims Alleged in the Complaint Were Substantial

Shortly after plaintiff filed her Amended Complaint, the Department of Social Services agreed to the entry of a Consent Decree which, according to the district court, "gave the plaintiff, as well as the class she represented,

virtually all the relief sought in the complaint." 455 F. Supp. at 1346. Specifically, the Department agreed that limits would no longer be imposed on deductions for work-related expenses. It also agreed to increase the work-related transportation allowance from 6 cents to 12 cents per mile and to apply the increase to current as well as future recipients; to base other standard allowances for work-related expenses upon current prices available in the locality where the recipient resides; and to review the standard allowances at least annually in light of increases in the cost of living. Finally, in response to plaintiff's procedural due process complaints, the Department agreed to give both written and oral notice to recipients of their right to claim deductions for work-related expenses in excess of the Department's standard allowances and to challenge any refusal to allow such excess deductions in an administrative fair hearing. (A. 76-82). The relief obtained through the Consent Decree thus responded to plaintiff's claims involving the calculation of work-related expenses and her claims involving the lack of notice respecting the Department's policies in this area.[12]

It has been the virtually unanimous view of the lower courts that plaintiffs who recover substantial relief prior to judgment through the voluntary action of the defendant in response to their suit or through a settlement agreement in the suit are "prevailing parties" within the meaning of section 1988 and other similarly worded attorneys' fees statutes. *See, e.g., Iranian Students Ass'n v. Edwards,* 604 F.2d 352, 353 (5th Cir. 1979); *Dawson v. Pastrick,* 600 F.2d 70, 78 (7th Cir. 1979); *Bonnes v. Long,* 599 F.2d 1316, 1318 (4th Cir. 1979); *Ross v. Horn,* 598 F.2d 1312, 1322 (3d Cir. 1979); *Nadeau v. Helgemoe,* 581 F.2d 275, 278-81 (1st Cir. 1978); *Fischer v. Adams,* 572 F.2d 406, 410-11 (1st Cir. 1978); *Foster v. Boorstin,* 561 F.2d 340, 343 (D.C. Cir. 1977); *Brown v. Culpepper,* 559 F.2d 274, 277 (5th Cir. 1977); *National Bldg. Maintenance, Inc. v. Sampson,* 559 F.2d 704, 708-709 (D.C. Cir. 1977); *Cuneo v. Rumsfeld* 533 F.2d 1360, 1364 (D.C. Cir. 1977); *Peltier v. City of Fargo,* 533 F.2d 374, 380 (8th Cir. 1976); *Evans v. Sheraton Park Hotel,* 503 F.2d 177, 189 (D.C. Cir. 1974); *Parham v. Southwestern Bell Telephone Co.,* 433 F.2d 421, 429-30 (8th Cir. 1970); *Parker v. Matthews,* 411 F.Supp. 1059, 1962-63 (D.D.C. 1976), *aff'd sub nom., Parker v. Califano,* 561 F.2d 320 (D.C. Cir. 1977). These cases reflect the courts' recognition of several strong policy reasons for allowing attorneys' fees in settled cases, as well as the clear intent of Congress as expressed in the Committee Reports for the Fees Awards Act.

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[12] Defendant suggests in his Brief for Petitioner at 11 that plaintiff was not a prevailing party because she had unsuccessfully asserted her claim that she was denied work-related expense deductions in a state administrative hearing. However, as the court of appeals recognized, the defendant failed to raise this claim of *res judicata* with the district court at any time prior to entry of the Consent Decree and is thus precluded from raising it now. *See United States v. Friedland,* 391 F.2d 378, 381-82 (2d Cir. 1968), 441 F.2d 855 (2d Cir.), *cert. denied,* 404 U.S. 867, 914 (1971); *Crowe v. Cherokee Wonderland, Inc.,* 379 F.2d 51 (4th Cir. 1967).

The fundamental purpose of fee shifting provisions, to encourage private enforcement of the underlying rights created by Congress, would be seriously frustrated if plaintiffs were not entitled to attorneys' fees where they obtain relief prior to judgment. *See Bonnes v. Long,* 599 F.2d at 1318. Plaintiffs could not afford to take the risk of litigation if their right to fees could be so easily defeated. And many private attorneys would be unwilling to accept civil rights cases on a contingent fee basis if that were the rule.

As important, it would discourage voluntary settlement of judicial disputes, if the only way plaintiffs could recover attorneys' fees were to go to trial on the merits.[13] As the court of appeals stated in this case, the denial of fees to settling plaintiffs "would encourage plaintiffs to try cases in which reasonable settlement offers have been received, merely to ensure a fee award." 594 F.2d at 340. Finally, if parties cannot be awarded attorneys' fees by the court, after a settlement of their main claims, they would be forced to negotiate for attorneys' fees prior to the final settlement. Where the party's attorney has agreed to seek payment of his fee only from the the defendant, and not out of his client's recovery, such negotiations may present serious conflicts of interest. See *Prandini v. National Tea Co.,* 557 F.2d 1015 (3d Cir. 1977); *Regalado v. Johnson,* 79 F.R.D. 447, 451, (E.D. Ill. 1978). These conflicts may be avoided if claims for attorneys' fees may be submitted to the court, or settled, after the court has approved the settlement of the substantive claims in the case.

Congress was aware of these considerations when it adopted the Fees Awards Act, and it made it clear that a party who obtains relief through a voluntary settlement is a prevailing party under section 1988. The House Report, for example, stated:

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[13] This is not to say that a plaintiffs who settle a case for less than all of the relief sought in the complaint should recover attorneys' fees to the same extent as if they had gone to trial and prevailed on all issues. In fixing the amount of attorneys' fees district courts have discretion to take into account the extent to which the plaintiff failed to obtain full relief. *See, e.g., Sethy v. Alameda County Water Dist.,* 602 F.2d 894, 898 (9th Cir. 1979); *Jones v. Diamond,* 594 F.2d 997, 1027 (5th Cir. 1979); *Brown v. Bathke,* 588 F.2d 634, 637 (8th Cir. 1978); *Nadeau v. Helgemoe,* 581 F.2d 275, 278-79 (1st Cir. 1978); *Hughes v. Repko,* 578 F.2d 483, 487 (3d Cir. 1978).

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. *Incarcerated Men of Allen County v. Fair,* 507 F.2d 281 (6th Cir. 1974); *Parker v. Matthews,* 411 F. Supp. 1059 (D.D.C. 1976); *Aspira of New York, Inc. v. Board of Education of the City of New York,* 65 F.R.D. 541 (S.D.N.Y. 1975). A "prevailing" party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed. *E.g., Parham v. Southwestern Bell Telephone Co.,* 433 F.2d 421 (8th Cir. 1970); *Brown v. Gaston County Dyeing Machine Co.,* 457 F.2d 1377 (4th Cir.), *cert denied,* 409 U.S. 982 (1972): see also *Lea v. Cone Mills Corp.,* 438 F.2d 86 (4th Cir. 1971); *Evers v. Dwyer,* 358 U.S. 202 (1958).

H. Rep. at 7. Similarly, the Senate Report, citing a number of prior decisions, stated, "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. at 5.

Defendant does not contest this authority. Rather he argues that plaintiff in this case was not the prevailing party because "most of the provisions of the consent decree were restatements of what federal law required

and what the Department claimed it had been doing all along." Brief for Petitioner at 19.[14] The court of appeals found, however, "that the State changed its policies with great reluctance and only under the pressure of the lawsuit." 594 F.2d at 341. This finding is amply supported in the record and should not be disturbed.[15]

Finally, although plaintiff's claims were not decided on the merits, both the district court and the court of appeals held that she was the prevailing party because her claims were not insubstantial. Thus, the court of appeals stated: "[i]t does not matter which claim induced the concessions or which claim would have been successful at trial as long as the constitutional claim is substantial and arises from the same operative facts as the non-fee claim." 594 F.2d at 340. This holding is consistent with the express language of the House Report, see p. 19 *supra.* It also served to ensure that the district court had jurisdiction to enter the Consent Decree, *see, Hagans v. Lavine,* and that the plaintiff did not obtain the benefits of the Consent Decree merely because of the defendant's desire to avoid nuisance litigation. *See Nadeau v. Helgemoe,* 581 F.2d 275, 278-279; *Bonnes v. Long,* 599 F.2d 1316, 1319 (4th Cir. 1979); *Ross v. Horn,* 598 F.2d 1312, 1322 (3d Cir. 1979). If plaintiffs who settled their cases were required, as a condition of obtaining attorneys' fees, to prove that they would have prevailed on their claims if the case had gone to trial, then the benefits of settlement to the parties and the courts would be substantially vitiated, and the courts would be required to decide numerous constitutional issues unnecessarily.

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[14] The state also contends that the plaintiff was not the prevailing party on her constitutional claims because at the time the Consent Decree entered only a three-judge court could have entered an injunction against the defendant on the constitutional claim. Brief for Petitioner at 18. But the three-judge court statute, 28 U.S.C. § 2284, only prohibited a single judge from enjoining the enforcement of an unconstitutional statute. No such finding was required to be made before entry of the Consent Decree. This does not mean, however, that plaintiff's constitutional claims were not before the court, any more than would be the case where a single judge enters other orders in three-judge court cases. *See, Public Service Comm'n v. Brashear,* 312 U.S. 621 (1941).

[15] Defendant's admissions during discovery established that he had not corrected his work expense policies prior to the agreement. See, pp. 3-5, *supra.* Defendant conceded further in his Brief to the court of appeals, at 39, that the Department had not been properly informing recipients of what expense allowances they would receive, as alleged by plaintiff in her Amended Complaint (A. 61-62), and that plaintiff was responsible for that change being made. It is also relevant to note that public assistance recipients had previously been forced to sue in federal court in order to obtain changes in the state's work expense policies; *see, Campagnuolo v. White,* Civ. No. 13968 (D. Conn. June 1972) (unpublished).

Furthermore, the settlement in this case was remedied under the close supervision and encouragement of the district judge, (*see,* R.A., certified list of docket entries, referring to hearing dates of February 2, 1977, through March 2, 1977), who was therefore in the best position to evaluate the defendant's motivation with respect to the settlement.

In sum, the courts below correctly decided under appropriate standards that plaintiff in this case was the prevailing party within the meaning of 42 U.S.C. § 1988.

2. The Courts Below Correctly Held That an Award of Fees Was Not Barred by the Eleventh Amendment

Since attorneys' fees were awarded in this case against the defendant in his official capacity, it is necessary to consider whether the award is prohibited by the Eleventh Amendment. The answer to this question, plaintiff submits, is found in this Court's decision in *Hutto v. Finney,* 437 U.S. 678 (1978).

Hutto upheld attorneys' fees awarded under section 1988 against state prison officials in their official capacities. Relying on its previous decision in *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), the Court held that "Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment." 437 U.S. at 693. And, it found that Congress, in adopting the Fees Awards Act, intended both to exercise its power under the Fourteenth Amendment and "to authorize fee awards payable by the States when officials are sued in their official capacities." *Id.* at 693-94.

The Court rejected the contention of the prison officials that Congressional intent to abrogate the Eleventh Amendment under section 1988 was not sufficiently clear since it was expressed only in the reports and debates on the bill but not in the statute itself. Such a legislative statement was not necessary, according to Mr. Justice Stevens, because attorneys' fees are awarded under section 1988 as an element of costs, can "[c]osts have traditionally been awarded without regard for the State's Eleventh Amendment immunity . . . . The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants." 437 U.S. at 695.

Fees were awarded in *Hutto* after a finding, affirmed on appeal, that conditions in the prisons maintained by the defendants violated the Eighth and Fourteenth Amendments. The fact that the plaintiff's constitutional claims in this case were resolved prior to judgment does not, however, require a different result. As shown in Part I, the allowance of attorneys' fees, in cases in which consent judgments have entered, serves the interests of efficient judicial administration and sound constitutional adjudication. It is, therefore, as true in this case as in

Hutto that "A federal court's interest in orderly, expeditious proceedings 'justifies [it] in treating the state just as any other litigant, and in imposing costs on it' when an award is called for." 437 U.S. at 696, quoting from *Fairmont Creamery Co. v. Minnesota,* 275 U.S. 70, 77 (1927).[16]

The Court in *Hutto* also pointed out that prior decisions such as *Edelman v. Jordan,* and *Employees of the Dept. of Public Health and Welfare v. Department of Public Health and Welfare,* 411 U.S. 279 (1973), were not applicable to attorneys' fees awards because such awards "could hardly create any hardship for a State," 437 U.S. at 697 n. 27, and because "[u]nlike ordinary 'retroactive' relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead the award reimburses him for a portion of the expenses he incurred in seeking prospective relief." 437 U.S. at 695 n. 24. Again, these conclusions are not altered because the plaintiff in this case also alleged in her Complaint that her rights under the Social Security Act were violated or because the case was settled by a Consent Decree entered prior to trial on the merits.

The court of appeals below held that fee awards against state officials are not barred by the Eleventh Amendment because they fit within the "ancillary effect" doctrine of

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[16] Insofar as the award of attorneys' fees as costs serves the purpose of regulating the behavior of parties during litigation, see *Hutto v. Finney,* 437 U.S. at 695 n. 24, it is as useful during settlement negotiations as in any other stage of litigation.

Edelman v. Jordan, 415 U.S. 651 (1974), in that they are "incident to a judgment granting prospective relief." 594 F.2d at 341. Other courts have held similarly.[17]

The court of appeals' holding derives from this Court's holding in *Edelman,* that prospective injunctive relief may be awarded against state officials because "the fiscal consequences to state treasuries . . . [are] the necessary result of compliance with decrees which by their terms [are] prospective in nature". 415 U.S. at 668. This holding was reaffirmed last term in *Quern v. Jordan,* 440 U.S. 332 (1979), which upheld an order directing defendants to give notice advising public assistance claimants of their rights, because the notice was "more properly viewed as ancillary to the prospective relief already ordered by the Court". *Quern* at 349.

Fee awards have similarly been determined by Congress to be necessary to obtaining prospective relief in federal court. If the Eleventh Amendment does not prohibit the expenditure of state funds where necessary to effectuate a prospective order of the court, then it should not prohibit the award of attorneys' fees which are necessary to ensure that the case will be brought at all. The award of fees is thus ancillary. *See, Note, Attorneys' Fees And The Eleventh Amendment,* 88 Harv. L. Rev.

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[17] *Fitzpatrick v. Bitzer,* 519 F.2d 559, 571-72 (2d Cir. 1975), *aff'd in part, rev'd in part,* 427 U.S. 445 (1976); *Souza v. Travisono,* 512 F.2d 1137, 1139-40 (1st Cir. 1975), *vacated and remanded,* 423 U.S. 809 (1975); *Class v. Norton,* 505 F.2d 123 (2d Cir. 1974); *Boston Chapter NAACP, Inc. v. Beecher,* 504 F.2d 1017, 1028-30 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); *Jordan v. Fusari,* 496 F.2d 646 (2d Cir. 1974). *Cf. Jordan v. Gilligan,* 500 F.2d 701 (6th Cir. 1974), *cert. denied,* 421 U.S. 991 (1975); *Skehan v. Board of Trustees,* 501 F.2d 31 (3d Cir. 1974), *vacated and remanded,* 538 F.2d 53 (1976) (en banc), *cert. denied,* 429 U.S. 979 (1976).

1875, 1893-96 (1975); S. Rep. at 5 ("We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws . . . .").

The Court's analysis in *Hutto* strongly suggests additionally, that attorneys' fees, as litigation costs, fall outside of the Eleventh Amendment's prohibition without regard to whether or not Congress has acted pursuant to its authority under the Fourteenth Amendment.[18] *See also, Fitzpatrick v. Bitzer,* 427 U.S. at 456, concurring opinion of Mr. Justice Stevens.[19] However, even if congressional power under section 5 was essential to the Court's analysis, a different result is not required in this case, for it is clear that Congress has authority under section 5 to provide fees in cases, such as this one, where substantial constitutional claims are raised in the complaint but not decided by entry of final judgment.

It cannot be denied that Congress has power under section 5 to authorize the award of attorneys' fees against states where there has been a judicial finding of a violation of the Constitution or of a statute passed pursuant to section 5. In *Fitzpatrick v. Bitzer,* the Court held that Congress has power under section 5 of the Fourteenth Amendment to permit the award of attorneys'

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[18] Attorneys' fees have been referred to as costs "as between solicitor and client." *Sprague v. Ticonic National Bank,* 307 U.S. 161, 165 (1939).

[19] Congress' description of attorneys' fees "as a part of costs" appears to have been deliberate, as a way of indicating its belief that attorneys' fees, like costs, are not subject to the Eleventh Amendment, referring as it does to *Fairmont Creamery Co. v. Minnesota.* S. Rep. at 5, n. 6. The House Report also cites to *Fitzpatrick v. Bitzer,* H. Rep. at 7, n. 14 and may have relied on Justice Stevens' concurring opinion to the effect that attorneys' fees should be categorized as other litigation costs.

fees against states found to have violated the employment discrimination prohibitions of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. §2000e. In *Hutto v. Finney,* the Court stated that under section 5 Congress has power to authorize the award of attorneys' fees against state officials who have been found in violation of the Eighth and Fourteenth Amendments.[20]

Fitzpatrick and *Hutto* are consistent with the Court's prior pronouncement that "§5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan,* 384 U.S. 641, 651

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[20] The defendant's discussion of *Edelman v. Jordan,* Brief for Petitioner at 13, totally misreads the Court's opinion in that case. Nothing in *Edelman* suggests that its holding with respect to congressional intent to abrogate the Eleventh Amendment under section 1983 depended upon the fact that statutory and constitutional claims had been joined in that Complaint. The Court's decision rested on the larger question of congressional intent with respect to state immunity from damages in all types of cases. *See, Quern v. Jordan,* 440 U.S. at 344-45; *Hutto v. Finney,* 437 U.S. at 697-98.

Similarly, the defendant's reliance on *Chapman v. Houston Welfare Rights Organization,* ___ U.S. ___ , 99 S.Ct. 1905 (1979), Brief for Petitioner at 13-16, for the contention that neither section 1983 nor section 1988 provide the requisite congressional authorization necessary to overcome Eleventh Amendment immunites, is mistaken. The Court's conclusions in *Chapman* that section 1983 does not itself protect any civil rights, and that the Social Security Act is not a law providing for equal rights, were important in that case because of the limiting language of 28 U.S.C. §1343(3) and (4). Here, however, section 1988 authorizes attorneys' fees to be awarded in any action brought to enforce section 1983, including actions were pendent claims are joined to constitutional claims, not just in actions involving "civil rights." Congressional authorization for the award of attorneys' fees against state officials in cases such as this one, as in *Hutto v. Finney,* is thus found in section 1988 itself.

(1966). The Fees Awards Act was intended to encourage more vigorous enforcement of laws passed pursuant to the Fourteenth Amendment. Through extensive hearings, Congress was aware that many citizens could not afford the legal fees required to maintain protracted litigation necessary to vindicate rights secured by the Constitution and federal laws, and that the resulting lack of enforcement of federal constitutional and statutory guarantees had the effect of undermining confidence in governmental processes.[21] The shifting of litigation costs such as attorneys' fees was recommended as the best available method of encouraging litigation under the civil rights laws.

From the standpoint of congressional power under Section 5, it is a very small step from providing a remedy, such as attorneys' fees, where states have been found by a court to have violated the Fourteenth Amendment or a statute enacted pursuant to the Fourteenth Amendment, to providing a similar remedy in cases where the charges of constitutional violations are not resolved by a court on the merits because of a prior settlement of the parties. Having weighed "the various conflicting considerations," *Katzenbach v. Morgan,* 384 U.S. at 653, Congress was "well within [its] authority," *id.*, to conclude that litigation to enforce rights guranteed by the Fourteenth Amendment will be encouraged and enhanced if attorneys' fees may be awarded even where no final judicial decision is reached on the constitutional issues presented in a case. Congress heard specific testimony concerning the frequent practice of government defendants attempting to moot cases or settle them prior to final judgment,[22] and it quite properly concluded that the remedial purposes of the Fees Awards Act might be undercut if defendants could avoid the imposition of attorneys' fees merely by this device. Similarly, Congress was aware that claims under the Fourteenth Amendment often are joined with claims under state law or under federal statutes, see pp. 18-23, *supra,* and it again reasonably concluded that permitting fees to be awarded in such cases would serve the purpose of encouraging litigation to enforce the Fourteenth Amendment.

Congress' resolution of these issues is "plainly adapted" to the end of encouraging litigation under the Fourteenth Amendment. *Katzenbach v. Morgan,* 384 U.S. at 651. The Act places an additional remedy in the hands of federal judges to be used for the purpose.[23] As construed by the court of appeals in this case, in order to obtain attorneys' fees awards under section 1988 prior to a final judicial determination of the constitutional claim, a plaintiff must demonstrate that his constitutional claim was substantial enough in its own right to support the jurisdiction of the court; that he obtained relief which remedied at least in part the constitutional and statutory violations alleged; and, finally, that this relief was the result of the lawsuit and not of the defendant's unrelated actions. Moreover, the discretion afforded the courts under section 1988 in determining whether fees are appropriate and, if so, in what amount, further guarantees that the remedy afforded will be adapted to Congress' proper purposes under section 5.

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[21] *Hearings on Legal Fees Before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary,* 93rd Cong., 1st Sess. 1, 790, 796-97, 806-07, 833-36, 852, 855-58 (1973).

[22] *Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House of Representatives Committee on the Judiciary,* 94th Cong., 1st Sess. 134-35 (1975).

[23] It is clear after *Katzenbach v. Morgan,* 384 U.S. at 652 and 667-670 (Harlan, J. dissenting), that remedial legislation enacted under section 5 of the Fourteenth Amendment to cure violations of constitutional rights is a justifiable exercise of congressional power. By enacting legislation which provides federal judges with an additional remedy in appropriate cases, Congress has left the interpretation of the substantive guarantees of the Fourteenth Amendment to the judiciary.

Finally, there can be no argument that the award of attorneys' fees in cases such as this one is prohibited by "the letter and spirit of the Constitution." *Katzenbach v. Morgan,* 384 U.S. at 651. The State does not and could not contend that the award of attorneys' fees under section 1988 in this case violates any provision of the Constitution apart from the Eleventh Amendment. And, with respect to that provision, *Fitzpatrick* and *Hutto* both make clear that, so long as the award is within Congressional power under section 5, as we contend it is, there can be no conflict with the Eleventh Amendment.

Nor, in light of *Fitzpatrick* and *Hutto,* can it be contended that fee awards "impair states' integrity or their ability to function effectively in a federal system." *Fry v. United States,* 421 U.S. 542, 547-48 (1975); *see also, National League of Cities v. Usery,* 426 U.S. 833, 851-52 (1976). As *Hutto* expressly recognized, attorneys' fee awards "could hardly create any such hardship for a state," 437 U.S. at 697, N. 27, especially where, as here, the case is resolved at an early stage by a consent judgment, before the time and effort invested in the case become significant.

In sum, the fact that plaintiff's constitutional claims were never resolved on the merits by the district court does not mean that the attorneys' fee award in this case is barred by the Eleventh Amendment. Under either of

the two rationales relied on by this Court in upholding the section 1988 fee award in *Hutto,* the attorneys' fee in this case was proper.

CONCLUSION

For the foregoing reasons the decision of the court of appeals should be affirmed.

Respectfully submitted,

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